Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

**CITY OF SANTA CLARITA,**
*Petitioner,*

*v.*

**COUNTY OF LOS ANGELES, CEMEX, INC., AND UNITED STATES BUREAU OF LAND MANAGEMENT,**
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a court approve a consent decree to which a nominally adverse plaintiff and defendant stipulate where that consent decree disposes of properly presented claims of a nonconsenting intervenor as of right without any adjudication of that intervenor's legally protectable interest?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... (i)

TABLE OF CONTENTS ..... (ii)

TABLE OF AUTHORITIES ..... (vi)

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATEMENT OF CASE ..... 2

SUMMARY OF ARGUMENT ..... 5

ARGUMENT ..... 7

I. A Bilateral Consent Decree Cannot Resolve the Claims of a Nonconsenting Third-Party Intervenor as of Right ..... 7

II. Review of a Consent Decree by a District Court Is No Substitute for a Party's Right to Adjudication of Its Claims ..... 13

III. *Firefighters* Has Led Subsequent Courts Erroneously to Authorize the Termination of Non-Settling Parties' Rights Without Adjudication ..... 17

IV. The Use of Non-Consensual Consent Decrees Has Fostered Abuse in a Wide Range of Litigation and Systematic Violation of Third Parties' Rights, as This Case Demonstrates . . 24

V. The Proper Use of Consent Decrees Will Permit Courts to Continue to Resolve Disputes Between Settling Parties While Preserving the Valid Claims of Nonconsenting Parties . . . . . 27

CONCLUSION . . . . . 29

APPENDICES

APPENDIX A

Decision Affirming Entry of Consent Decree, United States Court of Appeals for the Ninth Circuit, Filed February 10, 2006 . . . . . A-1

APPENDIX B

Decision Reversing Denial of Santa Clarita's Motion to Intervene as of Right, United States Court of Appeals for the Ninth Circuit, Filed February 24, 2004 . . . . . B-1

APPENDIX C

Judgment, Consent Decree (Exhibits A-J Excluded), United States District Court for the Central District of California, Filed May 20, 2004 . . . . . C-1

Order Granting Cemex's Request for Judicial Notice and Granting Motion for Entry of Consent Decree, United States District Court for the Central District of California, Filed May 3, 2004 . . . . . C-85

APPENDIX D

Order Granting *Ex Parte* Application of Plaintiff CEMEX, Inc. for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Motion for Summary Judgment of City of Santa Clarita, United States District Court for the Central District of California, Filed April 8, 2004 ..... D-1

APPENDIX E

United States Constitution Amendment V ..... E-1
Federal Rules of Civil Procedure Rule 19 ..... E-2
Federal Rules of Civil Procedure Rule 23(a) & (e) . E-3
Federal Rules of Civil Procedure Rule 24 ..... E-4
California Public Resources Code § 21081 ..... E-7
California Public Resources Code § 21153 ..... E-8
California Public Resources Code § 21168 ..... E-9

APPENDIX F

Excerpts from Second Amended Complaint for Declaratory and Injunctive Relief, Writ of Mandate, and Damages, United States District Court for the Central District of California, Filed May 10, 2002 . F-1

APPENDIX G

Answer of the City of Santa Clarita to Second Amended Complaint of Cemex, United States District Court for the Central District of California, Filed March 9, 2004 ..... G-1

APPENDIX H

City of Santa Clarita's Notice of Motion and Motion for Summary Judgment/Adjudication, United States District Court for the Central District of California, Filed April 5, 2004 ..... H-1

APPENDIX I

Excerpts from City of Santa Clarita's Opposition to Memoranda in Support of Motion to Enter Consent Decree, United States District Court for the Central District of California, Filed April 5, 2004 ..... I-1

APPENDIX J

Excerpts from Appellant's Request for Judicial Notice, United States District Court for the Central District of California, Filed December 30, 2004 .. J-1

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Alvarado v. J.C. Penney Co., Inc.*,
997 F.2d 803 (CA10 1993) ..... 8

*BedRoc Limited, LLC v. United States*,
541 U.S. 176 (2004) ..... 2

*Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*,
402 U.S. 313 (1971) ..... 10

*Catron County Board of Com'rs v. U.S. Fish & Wildlife Service*,
75 F.3d 1429 (CA10 1996) ..... 11

*Colorado River Indian Tribes v. Town of Parker*,
776 F.2d 846 (CA9 1985) ..... 11

*Firefighters v. Cleveland*,
478 U.S. 501 (1986) ..... *passim*

*Johnson v. Lodge #93 of Fraternal Order of Police*,
393 F.3d 1096 (CA10 2004) ..... 18, 20

*Kirkland v. New York State Department of Correctional Services*,
711 F.2d 1117 (CA2 1983) ..... 18-19

*Kourtis v. Cameron*,
419 F.3d 989 (CA9 2005) ..... 9

*Lawyer v. Department of Justice*,
521 U.S. 567 (1997) ..... 16

*League of United Latin American Citizens v. Clements*,
999 F.2d 831 (CA5 1993) ..... 8, 9

*Little Rock School District v. Pulaski County Special School District No. 1*,
921 F.2d 1371 (CA8 1990) ..... 26

*Martin v. Wilks*,
490 U.S. 755 (1989) ..... 9

*Officers for Justice v. Civil Service Commission*,
688 F.2d 615 (CA9 1982) ..... 5, 13, 15

*Orin v. Barclay*,
272 F.3d 1207 (CA9 2001) ..... 16

*Ragsdale v. Turnock*,
941 F.2d 501 (CA7 1991) ..... 18, 26

*Sanguine, Ltd. v. United States Department of Interior*,
798 F.2d 389 (CA10 1986) ..... 18

*Schneider v. Dumbarton Developers, Inc.*,
767 F.2d 1007 (CADC 1985) ..... 8

*Sheppard v. Beerman*,
317 F.3d 351 (CA2 2003) ..... 16

*Sierra Club, Inc. v. Electronic Controls Design, Inc.*,
909 F.2d 1350 (CA9 1990) ..... 13

*Southern California Edison Co. v. Lynch*,
307 F.3d 794 (CA9 2002) ..... 18, 23

*T.D. v. LaGrange School District No. 102*,
349 F.3d 469 (CA7 2003) ..... 27

*Ten. Association of Health Maint. Organizations v. Grier*,
262 F.3d 559 (CA6 2001) ..... 26

*United Services Automobile Association v. Foster*,
783 F. Supp. 916 (MD Pa. 1992) ..... 25

*United States v. City of Hialeah*,
140 F.3d 968 (CA11 1998) ..... 8, 18

*United States v. City of Miami*,
664 F.2d 435 (CA5 1981) ..... 8, 18

*United States v. Comunidades Unidas Contra La Contaminacion*,
204 F.3d 275 (CA1 2000) ..... 18, 26

*Viacom Intern., Inc. v. Kearney*,
212 F.3d 721 (CA2 2000) ..... 10

*Watt v. Western Nuclear, Inc.*,
462 U.S. 36 (1983) ..... 2

*Wheeler v. American Home Products Corp.*,
582 F.2d 891 (CA5 1977) ..... 8, 18

*Wilder v. Bernstein*,
645 F. Supp. 1292 (SDNY 1986) ..... 25

## STATE CASES

*Billig v. Voges*,
223 Cal. App. 3d 962,
273 Cal. Rptr. 91 (1990) ..... 20

*Harrisburg Ch. ACLU v. Scanlon*,
500 Pa. 549, 458 A.2d 1352 (1983) ..... 25

*Lockyer v. City and County of San Francisco*,
33 Cal. 4th 1055, 95 P.3d 459,
17 Cal. Rptr. 3d 225 (2004) ..... 20

*Steiner v. County of Marshall*,
568 N.W.2d 627 (S.D. 1997) ..... 25

## FEDERAL STATUTES

28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1331 ..... 1
28 U.S.C. § 1343(3) ..... 1

42 U.S.C. § 2000e-2(n) ..... 9
42 U.S.C. §§ 4321-4370f ..... 2

Fed. Rule Civ. Proc.

Rule 19 ..... 9, 10
Rule 23 ..... 14, 15
Rule 24(c) ..... 8, 9, 14, 20

## STATE STATUTES

Cal. Pub. Res. Code Ann.

§ 21081 (West 1996) ..... 5, 11
§§ 2710-2796.5 (West 2001) ..... 3
§§ 21000-21177 (West Supp. 2006) ..... 3
§ 21153(a) (West Supp. 2006) ..... 10
§ 21168 (West 1996) ..... 10-11

## OTHER AUTHORITIES

7C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 1920 (3d ed. 2004) ..... 8

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Cooper, The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process, 1987 U. Chi. Legal F. 155 ..... 24

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Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103 ..... 22, 24

Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys, Re: Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986) ..... 26

Mengler, Consent Decree Paradigms: Models Without Meaning, 29 B.C. L. Rev. 291 (1988) ..... 24

The City of Santa Clarita, California (hereinafter Santa Clarita), respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming entry of judgment, *Cemex Inc. v. Los Angeles County*, 2006 WL 314481 (CA9 Feb. 10, 2006) (unpublished) is Appendix A. A prior decision of the Ninth Circuit granting Santa Clarita intervention, *Cemex, Inc. v. County of Los Angeles*, 92 Fed. Appx. 457, 2004 WL 363354 (CA9 2004) (unpublished) is Appendix B. The order of the United States District Court for the Central District of California approving the consent decree at issue, ordering its entry as judgment, and containing the text of the consent decree (unpublished) is Appendix C. The District Court's *ex parte* order taking Santa Clarita's motion for summary judgment off calendar (unpublished) is Appendix D.

## JURISDICTION

On February 10, 2006, the United States Court of Appeals for the Ninth Circuit issued its decision affirming the judgment of the United States District Court for the Central District of California and directed the clerk to issue its mandate forthwith. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court's jurisdiction in the first instance was invoked under 28 U.S.C. §§ 1331 and 1343(3).

## STATEMENT OF CASE

This case concerns the proposal of Respondent Cemex, Inc. (hereinafter Cemex) to expand the Soledad Canyon sand and gravel mine, to permit the extraction of 56.1 million tons of sand and gravel, App. C-39—equal to five tons per minute for the next 20 years—just outside the limits of Santa Clarita.[1]

The former owner of the site had, into the 1980s, been mining sand and gravel understood to belong to it, but in 1983 this Court held that gravel is a mineral reserved to the United States. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983); but see *BedRoc Limited, LLC v. United States*, 541 U.S. 176 (2004) (in which six Members of the Court express the view that *Watt* was wrongly decided). That redefined the "split estate," moving ordinary gravel that had been understood to be part of the "surface estate" to the federal government's "mineral estate." After the federal government brought a series of trespass actions, the former surface owner's operation terminated in 1988. App. C-39. Santa Clarita subsequently purchased the surface estate. App. G-5.

The Bureau of Land Management (BLM) put the mining rights up to bid. App. C-39. In 1989 BLM awarded Cemex a 20-year contract to extract and sell 56.1 million tons of sand and gravel. App. C-10. Also in 1989 BLM prepared an Environmental Assessment of the sale under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, App. C-39, followed in 2000 by BLM's approval of a Final Environmental Impact Statement under NEPA and

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[1]Santa Clarita is the fourth-largest city in Los Angeles County, with a population of 167,974. (California Dept. of Finance, Demographic Research Unit, E-4 Population Estimates for Cities, Counties and the State, 2001-2005, with 2000 DRU Benchmark.)

publication of the BLM Record of Decision (ROD), App. C-41. The environmental review identified significant issues, including impacts on endangered species, App. C-40, 42-43, 47, traffic, App. C-47-48, air quality, App. H-17, water quality and water resources, *ibid.*, and public health, *ibid.* BLM concluded it had adequately mitigated all of the impacts except visual and air-quality. App. C-41.

The BLM ROD required that the project fully comply with all applicable state and local laws and secure all permits required by state law, including approval by the County of Los Angeles (hereinafter the County). App. H-20-22. In May 1991 Cemex applied to the County for a surface mining permit under the California Surface Mining and Reclamation Act (SMARA), Cal. Pub. Res. Code Ann. §§ 2710-2796.5 (West 2001). App. C-43. In the course of processing the application, the County commenced preparation of an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code Ann. §§ 21000-21177 (West Supp. 2006). Santa Clarita actively participated in the CEQA review process, opposing Cemex's expansion of mining operations. App. H-17.

On January 25, 2002, shortly after the County expressed concerns with the project's traffic impacts, Cemex filed this action in the District Court, alleging that the County's review under CEQA was preempted. App. C-48, App. F. The County Board of Supervisors subsequently denied the project as proposed. App. C-49-50.

Cemex's District Court complaint alleged that, notwithstanding BLM's requirement that the project comply with all applicable state and local laws and secure permits from the County, H-18-21, BLM's project approval preempted the County's review of the project. App. C-50-56; App. F. The United States moved to intervene as a plaintiff, citing its ownership of the sand and gravel and its interest as

recipient of royalties from Cemex; it recognized the state's right to enforce its environmental laws but claimed that was limited in this case and objected to delays in County review. App. C-56-58.

Santa Clarita also moved to intervene. App. B. The District Court twice denied Santa Clarita intervention. The Court of Appeals reversed, holding that Santa Clarita had significant legally protectable interests in the subject matter of Cemex's action that could, as a practical matter, be impaired by potential disposition of the case. *Ibid.* The Court found that the District Court had impermissibly ignored Santa Clarita's interests under the environmental laws that Cemex was seeking to have preempted and directed the lower Court to grant Santa Clarita intervention as of right. App. B-8.

On March 9, 2004, Santa Clarita filed its answer in intervention to the second amended complaint, App. G, and on April 5, 2004, in compliance with the then-existing scheduling order, Santa Clarita filed a motion for summary judgment to dispose of all of Cemex's claims, including the preemption claims, App. H.

The County had initially vigorously defended its jurisdiction, consistent with the concerns that its Board of Supervisors, Regional Planning Commission, and Department of Public Works had expressed about the project. App. C-45-50. However, by the time Santa Clarita returned to the District Court, the County had changed sides, agreeing, in negotiations from which Santa Clarita had been excluded, App. C-100-102, to a consent decree that (1) agrees to federal preemption of its environmental review, App. C-60-63; (2) stipulates to adequacy of the review already conducted, App. C-63-67; (3) "expressly revokes" its prior positions to the contrary, App. C-71-72; (4) commits the County to certify its most recent draft EIR "with no further public review or comment," App. C-71-73; (5) requires the County to adopt a

"Statement of Overriding Considerations," see Cal. Pub. Res. Code Ann. § 21081(b) (West 1996), and specifies the text, App. C-80; and (6) compels the County to issue permits and make findings approving the project, App. C-73-74, 76-80.

Santa Clarita objected to entry of the consent decree, App. I, and urged the Court to hear its pending motion for summary judgment before considering the consent decree. Instead, the Court, on Cemex's motion, took Santa Clarita's summary judgment motion off calendar, App. D-2, and then proceeded to enter the consent decree, App. C-85-125, over Santa Clarita's objections, *ibid.*, App. I. Although the consent decree recites that it is not "binding" on any nonconsenting party, in fact, as set out below, the consent decree has since been relied upon to terminate Santa Clarita's rights. App. J-7-9, 21-22.

Santa Clarita appealed to the Ninth Circuit, which affirmed in a memorandum disposition. App. A. The Court reviewed approval of the consent decree for "'fraud or overreaching by, or collusion between, the negotiating parties, and [to determine] that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned'"—the circuit's standard for review of class-action settlements. App. A-2, quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (CA9 1982). The Court found Cemex's preemption claim "plausible." *Ibid.* The panel directed that its mandate issue forthwith and retained jurisdiction of all future appeals involving the Soledad Canyon project. App. A-3.

## SUMMARY OF ARGUMENT

A party, including an intervenor as of right, may not have its rights terminated without an adversarial

determination on the merits. This much should be axiomatic, and it is generally so recognized. But, perhaps surprisingly, this is not so in an important set of cases, called in the literature "bilateral settlements" of "trilateral disputes." In such cases, as illustrated here, the courts have come routinely, even matter-of-factly, to approve "consent decrees" to which some of the parties have stipulated, that bind nonconsenting parties, who are denied the opportunity to litigate the rights the consent decree determines.

The problem can be traced in large part to this Court's decision in *Firefighters v. Cleveland*, 478 U.S. 501 (1986), where the Court approved a consent decree calling for preferential minority promotions over the objections of the intervenor union. While the opinion can be read to say that the objecting union had, in effect, waived any objections by not asserting any "claims" adverse to the settling parties, that is not how the courts have been reading the case. It has frequently—but not uniformly—been taken as authority to bind non-settling parties to litigation without according them the opportunity to litigate their claims. The problem is particularly acute when the non-settling party is, as Santa Clarita was in this case, an intervenor-defendant.

Based largely on *Firefighters*, courts now routinely approve consent decrees that abrogate the rights of nonconsenting parties. The practice sanctions the externalization of the costs of the settlement onto the nonconsenting party. It has led to widespread abuse in litigation over employment discrimination, religious freedom and other personal liberties, land and water rights, economic and environmental regulation, and a host of other cases where parties have agreed to a federal decree binding other parties to the litigation without their consent and without adjudicating the merits of their claims.

The fallacy of these cases is illustrated by the procedure the courts have employed, treating nonconsenting parties not like the plaintiffs or defendants they are but like class members objecting to a settlement. A "fairness hearing" for a class-action settlement is an inquiry whether the settlement negotiated by the class' representative is fair to the class, explicitly eschewing assessment of the merits of the class' claim. It is no place for merits rulings against nonconsenting parties on a finding that the agreement negotiated by adverse parties is somehow "fair."

Recognizing this right of a nonconsenting party does not preclude settlements by parties who do not wish to continue the fight. They may fully compromise their own interests so long as the resolution does not terminate the rights of other parties. But if they wish to resolve third parties' rights, each settling party must defend its adverse claims against the third parties—or simply step aside, declining to litigate its interests and allowing other parties to do so. This serves the substantial judicial interest in favor of voluntary resolution of disputes, but does so without abridging the due process rights of other litigants.

## ARGUMENT

### I. A Bilateral Consent Decree Cannot Resolve the Claims of a Nonconsenting Third-Party Intervenor as of Right

It is axiomatic that two parties to a lawsuit may not stipulate away the rights of a third, nonconsenting party. See *Firefighters*, 478 U.S., at 529 ("parties who choose to resolve litigation through settlement may not dispose of the claims of

a third party . . . without that party's agreement"); *United States v. City of Miami*, 664 F.2d 435, 442 (CA5 1981) (en banc) (Rubin, J.) (defendant union's consent required before court could approve portion of consent decree infringing union's contractual rights). This principle applies with equal force whether the nonconsenting party is an original party to a lawsuit or a third-party intervenor as of right. *Firefighters*, 478 U.S., at 529 ("A court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors."); *Wheeler v. American Home Products Corp.*, 582 F.2d 891, 896 (CA5 1977) ("[O]nce intervention has been allowed, the original parties may not stipulate away the rights of the intervener.") (internal quotation marks omitted), cited with approval in *Firefighters*, 478 U.S., at 529; *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 844-847 (CA5 1993) (hereafter *LULAC*).

An intervenor as of right becomes a full party to the action and is generally entitled to have its claims litigated "'just as if it were an original party.'" *Alvarado v. J.C. Penney Co., Inc.*, 997 F.2d 803, 805 (CA10 1993), quoting *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (CADC 1985). This includes the right to adjudication of its claims on the merits, whether through a motion for summary judgment or participation at trial. *United States v. City of Hialeah*, 140 F.3d 968, 976-978, 983 (CA11 1998); *Wheeler*, 582 F.2d, at 896; see also 7C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 1920 (3d ed. 2004) ("intervenor is entitled to litigate fully on the merits now that intervention has been granted") (internal quotation marks omitted). In the case of an intervenor-plaintiff, this right to adjudication entitles the intervenor to litigate fully any "claim" properly pled in its complaint-in-intervention, as required by Federal Rule of Civil Procedure 24(c).

Just as an intervenor-plaintiff is entitled to have its "claim" adjudicated before it is extinguished, an intervenor-defendant is entitled to have its "defense" adjudicated before being extinguished by judicial action. An intervenor-defendant is not required to plead "claims" in the traditional sense; rather, it is expected to assert properly pled "defense[s]." Fed. Rule Civ. Proc. 24(c); see *LULAC*, 999 F.2d, at 845-846 (defendant-intervenors have standing to defend current redistricting plan on appeal even if original defendants supported entry of consent decree, stating: "We have recognized that when fewer than all litigants forge a consent decree, issues affecting other parties remain to be adjudicated."). A party to the lawsuit, the intervenor cannot be said to have had its day in court if it is not permitted to litigate its claims and defenses on their merits.

The right of a party not to be bound by a consent decree to which it has not consented is illuminated by comparison to the rights of a *non-party* not to be bound by a consent decree. In *Martin v. Wilks*, 490 U.S. 755, 763 (1989), this Court held that one may not be bound by a consent decree entered in a case to which one was neither a party nor in privity with a party.[2] Rather, to be bound by a consent decree, the person must be joined as a necessary party under Federal Rule of Civil Procedure 19(a). *Martin*, 490 U.S., at 763-769. Necessary parties under Rule 19(a) and intervenors as of right under Rule 24(a) are defined virtually identically.[3] Of course,

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[2]Congress overrode *Martin* in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n), but "*Martin*'s holding remains intact outside of the employment discrimination setting." *Kourtis v. Cameron*, 419 F.3d 989, 999 n. 6 (CA9 2005).

[3]Here is the relevant text of Rule 24(a):

> Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may

the plaintiff and defendant may not even *maintain their action*, absent certain conditions, if a necessary party under Rule 19(a) is not joined. Rule 19(b); see, *e.g.*, *Viacom Intern., Inc. v. Kearney*, 212 F.3d 721, 725 (CA2 2000). Yet under the rule followed by the Ninth Circuit here, a person having exactly the same interest in the matter who has actually asserted that interest by moving to intervene can have the case dismissed out from under it by the opposing parties—and will then be bound by the judgment. That cannot be the law. Cf. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971) (preclusion impermissible where "litigants . . . have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them . . . .").

In affirming the District Court's judgment entered upon the consent decree, the Ninth Circuit denied Santa Clarita its day in court. The Court of Appeals had previously held that Santa Clarita had a statutory right to consultation under the state's environmental laws, and a protectable interest in upholding the County's application of CEQA against Cemex's allegations of federal preemption. App. B-4-5. CEQA grants Santa Clarita a statutory, legally protectable right to consult with the County, the lead agency under the statute, regarding the environmental impacts of the proposed project, Cal. Pub. Res. Code Ann. § 21153(a) (West Supp. 2006), and also the right to seek judicial review, *id.*, § 21168

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as a practical matter impair or impede the applicant's ability to protect that interest . . . .

Here is the relevant language of Rule 19(a):

> A person . . . shall be joined as a party in the action if . . . the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest . . . .

(West 1996), if the County denies Santa Clarita consultation rights or fails to discharge its duties to avoid or mitigate harm under specified circumstances, *id.*, § 21081. And beyond its rights under CEQA, Santa Clarita has proprietary interests, as owner of the project's surface estate, App. G-5, 46, and as an owner of property and employer of personnel at municipal sites within its city limits affected by the project, App. H-17. See, *e.g.*, *Catron County Bd. of Com'rs v. U.S. Fish & Wildlife Service*, 75 F.3d 1429, 1434 (CA10 1996); *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848-849 (CA9 1985).

The proposed mining project gravely threatens these interests. Through the simple expedient of stipulating to preemption, the County and the other signatories used the consent decree to extinguish these legally protectable interests with neither adjudication nor consent.[4]

Shortly after obtaining intervenor status, Santa Clarita moved the District Court to adjudicate these claims on their

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[4]Santa Clarita intervened specifically to protect these interests. It presented these claims in the first instance through its answer in intervention, which, for example, expressly denies Cemex's contention that the County's CEQA review process is preempted by federal law. See, *e.g.*, App. G-33-34. The answer also raises 29 affirmative defenses, including ripeness, Cemex's failure to exhaust, failure to state a claim, unclean hands, and violation of the Administrative Procedures Act. App. App. G-41-46. Specifically with respect to Cemex's preemption claims, the answer pleads, *inter alia*, that: (1) "[t]he conditions imposed, or recommended to be imposed, upon CEMEX's permit application by the County do not prevent the federal government from disposing of sand and gravel on federal land and are not . . . in conflict, or inconsistent, with federal law," App. G-43; (2) "[a]ny delays and/or continuances in the processing of CEMEX's application for a surface mining permit were the result of legitimate needs to further evaluate the Soledad Canyon Project's impact on the environment," App. G-43; and (3) "[t]he actions of the County in processing CEMEX's applications are expressly authorized and mandated by the Federal contracts and the ROD," App. G-45.

merits by filing a motion for summary judgment. App. H. If granted, the motion would have disposed of Cemex's complaint in its entirety, including its many causes of action related to federal preemption. The District Court, however, refused to hear this timely motion, opting instead to take the motion off calendar, to approve the consent decree, and to enter judgment. App. D.

The impact of the consent decree on Santa Clarita's validly raised claims is manifest. The consent decree impaired—indeed, obliterated—the very interests that Santa Clarita was granted intervention to protect. Pursuant to the consent decree, the County agreed to rescind 31 pages of findings supporting project denial and to halt any further CEQA review, thereby eradicating Santa Clarita's statutory right to consultation. App. C. The consent decree also finds that any further CEQA review would be preempted by federal law, *ibid*, thereby summarily disposing of all of Santa Clarita's defenses to Cemex's preemption claims. Finally, the decree compels the County to make findings and to issue permits approving the project, effectively foreclosing Santa Clarita's efforts to ensure a complete and thorough environment review and to include additional mitigation measures to protect Santa Clarita from the harmful environmental effects of the project.

There simply cannot be any doubt that Santa Clarita, like nonconsenting parties in numerous other cases dismissed upon consent decrees, has had its legal rights unceremoniously terminated without consent and without adjudication.

## II. Review of a Consent Decree by a District Court Is No Substitute for a Party's Right to Adjudication of Its Claims

The consenting parties will, of course, be quick to point out that Santa Clarita did have an opportunity to be heard—in the "fairness hearing" on the decree—so due process must have been satisfied. But the question is less *whether* one was heard than *on what* one was heard. A "fairness hearing" does not ask if the nonconsenting party has rights and what they are; it asks whether the settlement is *fair to those consenting.* The District Court here was explicit that it deemed itself required to enter any consent decree "'that . . . is fair, reasonable and equitable and does not violate the law or public policy.'" App. C-95, quoting *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (CA9 1990). It relied on the "arm's length" negotiations among the *consenting* parties as the basis for entering the decree and found no relevance in Santa Clarita's exclusion from those negotiations. App. C-100-102. That is a standard *no* bilateral consent decree could fail, no matter how it may trample the rights of third parties before the court. It illustrates the routine, now-doctrinal confusion of courts substituting the test of fairness to settling parties for an inquiry into the rights of non-settling parties.

The Ninth Circuit committed the same error on appeal, explicitly reviewing the consent decree under the standard for approving class-action settlements: whether "'the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" App. A-2, quoting *Officers for Justice*, 688 F.2d, at 625. But review of a class-action settlement is fundamentally different from review of a consent decree in a non-class action entered

over the objection of a nonconsenting party. When a court reviews a class-action settlement, it is inquiring mainly whether the class representative and counsel faithfully discharged their fiduciary duties to the class. Fed. Rule Civ. Proc. 23(e)(1)(C). When the court reviews a proposed consent decree to which a party has not consented, it should be asking whether the consenting parties are taking away from the nonconsenting party to whom they are adverse that which may not be summarily taken. The former standard could not be less appropriate to the latter inquiry.

The Rule 23 "fairness hearing" to approve a consent decree that binds a class is the logical outgrowth of the requirements placed on the class representative, that it represent the interests of the class "fairly and adequately." Rule 23(a). Therefore, a court may only approve a "settlement, voluntary dismissal, or compromise that would bind class members . . . after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." Rule 23(e)(1)(C). Permitting objecting class members to present their objections to a consent decree during a "fairness hearing" is the due process that Rule 23 affords class members, providing them with a forum to show that their class representative did not adequately represent their interests. Once the court verifies that "the parties negotiated the consent decree in good faith and at arm's length" its inquiry is complete and it "find[s] the decree is 'fundamentally fair, adequate and reasonable.'" App. A-2, quoting *Officers for Justice*, 688 F.2d, at 625.

An intervenor has no such "representative." On the contrary, intervention as of right is permitted only when the applicant's interest is not already adequately represented by the existing parties. Rule 24(a). Thus, when it permitted Santa Clarita to intervene as of right, the Court of Appeals expressly found that Santa Clarita's interests were not

adequately represented by the existing parties, specifically that Santa Clarita's interests were not adequately represented by the County. App. B-7. To extinguish Santa Clarita's rights on a finding that parties adverse to Santa Clarita "negotiated the consent decree in good faith and at arm's length" is not to review the consent decree but to rubber-stamp it. No consent decree negotiated by adversaries will ever fail this test.

The Ninth Circuit's reliance on the class-action precedent in general, and *Officers for Justice* in particular, reveals how little thought courts now give to approval of consent decrees binding nonconsenting parties. *Officers for Justice* is clear that it is examining the proposed consent decree under Rule 23(e), and that the "primary concern of this subsection is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice*, 688 F.2d, at 624. Review of the decree is explicitly not to determine the merits but to see whether the compromise of class members' claims is reasonable given the costs and risks of litigation, potential for delay, and other risk-factors relevant to class members. *Ibid.*[5] The wooden application of Rule 23 standards to non-class cases illustrates how courts have misgrafed the Rule 23 "fairness hearing" onto the adversarial case, confusing the question whether a party has been treated fairly by its lawyers with the question whether a

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[5]The Court of Appeal quoted from *Officers for Justice* the phrase that the question is whether the consent decree is "fair, reasonable and adequate to all concerned." App. A-2, quoting 688 F.2d, at 625. It is clear from *Officers for Justice* that "all concerned" refers to class members and, plausibly, the settling adverse party and class counsel, who obviously have a stake in approval of a settlement. There is absolutely no indication that *Officers for Justice* understood a Rule 23 fairness hearing to implicate the interests of persons who are neither class members nor parties to the proposed settlement (of whom there were none in that case).

party has been treated fairly by its adversaries. A "fairness hearing" is adequate to the first question but cannot possibly suffice for the second.[6]

The procedural posture of the consent decree here offers an additional insight into the error. Santa Clarita had a motion for summary judgment pending, which the District Court took off calendar to allow it to approve the consent decree first. App. D-2. Had the Court entered summary judgment in favor of the consenting parties, that order would have been reviewed de novo by the Court of Appeals, with all inferences in favor of the non-moving party. *E.g.*, *Sheppard v. Beerman*, 317 F.3d 351, 354-355 (CA2 2003); *Orin v. Barclay*, 272 F.3d 1207, 1214 (CA9 2001). By the contrivance of a "fairness" finding, district courts simultaneously avoid a determination on the merits and insulate their rulings from meaningful appellate review.

In any other context, it would be preposterous to suggest that a trial court can dispose of a party's claim without a

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[6] *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) is not to the contrary. Lawyer was a voter who sued the state and the U.S. Department of Justice, initially challenging on Equal Protection grounds a redistricting plan for his legislative district. In the course of the litigation, the Department of Justice and the state Attorney General agreed to invalidation of the challenged district and the drawing of a new district, to which the original plaintiff again objected. In upholding a consent decree entered over his objections, the Court said that he could not insist on adjudication of the original plan because it had been voided as he had demanded. 521 U.S., at 579-580 (calling plaintiff a "sore winner"). The Court also approved the lower court's disposition of plaintiff's objection to the new plan because he was given "unimpaired" rights to make his claims in the hearing on the consent decree. *Id.*, at 580. While that proceeding was mislabeled a "fairness hearing," *id.*, at 569, it is clear that it was in fact a hearing on the merits, see *id.*, at 574-575, constrained only by the fact that the plaintiff himself declined to tender any relevant evidence in support of his claims, *id.*, at 575. The Court was emphatic that "[t]here is no merit to appellant's contention that the District Court failed to adjudicate the constitutionality of" the new district. *Id.*, at 580 n. 7.

ruling on the merits and without meaningful appellate review. The fact that it has done so at the urging of parties hostile to the victim scarcely legitimizes the practice or the result.

## III. *Firefighters* Has Led Subsequent Courts Erroneously to Authorize the Termination of Non-Settling Parties' Rights Without Adjudication

In *Firefighters*, plaintiff, an organization representing minority firefighters, had sued Cleveland alleging employment discrimination. Plaintiff and Cleveland negotiated a consent decree that provided for preferential promotions based on race. Firefighters Local Number 93, the bargaining agent for all firefighters, moved to intervene "as a party-plaintiff" but "did not allege any causes of action or assert any claims against either [plaintiff] or the City"—although it did object to the fairness of the proposed decree and expressed its "absolute and total objection to the use of racial quotas." 478 U.S., at 506-507, 511. However, as this Court noted, "[a]part from thus expressing its opinion as to the wisdom and necessity of the proposed consent decree, the Union . . . failed to assert any legal claims against either [plaintiff] or the City." *Id.*, at 511. In fact, "despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims." *Id.*, at 530. Given these facts, the Court approved the consent decree, finding that while "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree[,] the consent decree entered here does not bind Local 93 . . . [and] imposes no legal duties or obligations on the Union at all." *Id.*, at 529-530 (citations omitted).

It is possible to read *Firefighters* narrowly, reflecting the fact that the intervenor simply failed to assert any claims or defenses. But that is not how it has subsequently been interpreted by many courts. And while it is certainly true that the circuits are split on this issue, the more important point is that the case law reveals confusion among the circuit courts about the meaning of *Firefighters* and the process due an objecting third party in cases involving consent decrees. Compare *City of Miami*, 664 F.2d, at 442, 447 (Rubin, J.) (invalidating bilateral consent decree in trilateral dispute to the extent that decree resolved claims of nonconsenting party); *City of Hialeah*, 140 F.3d, at 983-984 (affirming district court's refusal to enter portions of consent decree over objection of nonconsenting parties); *Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389, 391-392 (CA10 1986) (vacating consent decree entered over objection of intervenor-defendants while district court's denial of intervention was pending on appeal); *Wheeler*, 582 F.2d, at 896 (reversing district court decision dismissing action based on consent decree over objection of intervenors that had properly asserted claims which remained unadjudicated) with *Ragsdale v. Turnock*, 941 F.2d 501, 504 (CA7 1991) (holding that consent decree was properly entered over objection of applicants who were denied intervention as of right in part because, had intervention been permitted, intervenors could block consent decree); *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807 (CA9 2002) (affirming approval of consent decree over objection of intervenor-defendants that properly pled defenses in the litigation); *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 278-279 (CA1 2000) (affirming district court's approval of consent decree over objection of intervenor-plaintiff); *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096, 1108-1109 (CA10 2004) (upholding approval of consent decree over objection of intervenor-defendant); *Kirkland v.*

*New York State Dept. of Correctional Services*, 711 F.2d 1117, 1125-1128 (CA2 1983) (affirming district court's entry of consent decree over objection of intervenor-defendant).

Some courts' expansive reading of *Firefighters*, applying it to intervenors as of right who have properly asserted claims or defenses, is largely attributable to inadequate analysis of what it means for a party to be "bound" by a consent decree, and to imprecise use of the word "claims," leading to abrogation of defenses held by intervenor-defendants.

One certainly cannot fault this Court for its recitation of the general rule:

> It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

478 U.S., at 528-529. The near-tautology that parties may settle "their own disputes" is true but not helpful when a forthright examination of trilateral cases must acknowledge that the "disputes" the consenting parties are settling are decidedly not "their own." In *Firefighters* the dispute involved employees competing for the same jobs the settling parties were seeking. The intervenor was not seeking to block somebody else's settlement "merely by withholding its consent," it was seeking to protect its members' jobs and the promotion system it negotiated in collective bargaining.[7] This

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[7]And as then-Justice Rehnquist's dissent makes clear, the majority was erroneously relying for authority on cases involving permissive intervention.

difference is clear from the present case, where the consent decree to which the County agreed explicitly provides for the circumvention of the environmental review process detailed in CEQA,[8] a process in which the City has a legally protectable right to participate. App. B. Precisely the rights the Court of Appeals found to warrant Santa Clarita's intervention are abrogated by the consent decree.

*Firefighters* also makes a statement that has since contributed to confusion in the cases regarding what it means for a consent decree to "bind" a nonconsenting party:

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> An intervenor as of right becomes a party to the action because "the disposition of the action may as a practical matter impair or impede his ability to protect that interest," Fed. Rule Civ. Proc. 24(a), whereas a permissive intervenor typically becomes a party only to ward off the potential effects of *stare decisis*.

478 U.S., at 539 n.* (Rehnquist, J., dissenting); see *Johnson*, 393 F.3d, at 1108-1109 (where permissive intervenors were afforded the opportunity to object to the consent decree, their rights were not affected by the consent decree and trial on the merits was not warranted).

[8]There is substantial doubt that the County even had the authority to stipulate to preemption. Article III, section 3.5 of the California Constitution prohibits administrative agencies from

> refus[ing] to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Although one California court has applied this prohibition to local government officials, *Billig v. Voges*, 223 Cal. App. 3d 962, 969, 273 Cal. Rptr. 91 (1990), the California Supreme Court has left the question open for the moment. *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1085-1086, 95 P.3d 459, 17 Cal. Rptr. 3d 225 (2004). For present purposes it suffices to note that a federal court that permits a creature of state law to neutralize other state laws by stipulation to federal preemption places unnecessary strains on the federal system and undermines compelling state interests memorialized, in this case, in the state Constitution.

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. However, the consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. Moreover, the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, under § 703 of Title VII, or as a matter of contract.

478 U.S., at 529-530 (citations omitted). But the reason the union lost no claims is solely that it asserted no claims. Had it chosen to assert the claims of the employees not represented by the plaintiff, the Court would have had to acknowledge that, in the words of the dissent,

> the Court's suggestion . . . that "the consent decree entered here does not bind Local 93 to do or not to do anything," . . . verges on the pharisaical; the decree *does* bind the City of Cleveland to give preferential promotions to minority firefighters who have not been shown to be the victims of discrimination in such a way that nonminority

> union members who would otherwise have received these promotions are obviously injured.

478 U.S., at 537 (Rehnquist, J., dissenting (original emphasis)).

The majority opinion's assurance that the consent decree "does not bind" the nonconsenting third party suggests that a party is not "bound" unless the consent decree orders the party to do or not do something, exposes the party to contempt for non-compliance, or explicitly adjudicates the party's "claims" (of which it found the intervenor before it had none). But an intervenor-*defendant* such as Santa Clarita here is bound by the consent decree in two other ways not considered by *Firefighters*: First, the right Santa Clarita secured by intervention—the right to participate in the environmental-review process—was eliminated by the decree that simply terminated that process. And second, any attempt by Santa Clarita to sue the County for failure to discharge its state-law obligations would be foreclosed by the consent decree and by the preclusive effect of the judgment. As Prof. Laycock has observed: "If necessary for court approval of the decree, [consenting parties] may argue that [intervenor] will not be bound" but "after the decree is entered, [they] regularly argue that [intervenor] is bound. Often that argument is accepted." Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 119 (hereafter Laycock).[9]

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[9]The present case reflects precisely such a bait-and-switch scheme. The consent decree itself never mentions Santa Clarita. App. C-4-83. On the contrary, Santa Clarita is not listed as a party bound by the decree, App. C-20-21, and the decree does not expressly provide for Santa Clarita to release any claims against the consenting parties. App. C-33. Yet the District Court has embraced the consenting parties' position that, because Santa Clarita was permitted to participate as an intervenor in this action, it is now barred by preclusion principles from litigating any claim or issue which was, or could have been, raised in the present action. App. J-21-

The misdirection of the lower courts by *Firefighters* has been compounded by the confusing use of the word "claims." As the passage from pages 529-530 of *Firefighters* quoted at page 21, above, reveals, the majority recognized that a consent decree "may not dispose of the claims of a third party" and "therefore cannot dispose of the valid claims of nonconsenting intervenors," but because, the opinion holds, the union failed to assert any claims, the consent decree did not "dispose of" its claims. This limitation has led some courts to believe, as did the Ninth Circuit, that an intervenor must have "claims," and not "defenses," in order to be protected from a consent decree negotiated by other parties. See also *Southern California Edison Co.*, 307 F.3d, at 807. That is a misapprehension that has rendered the lower courts insensate to the rights of intervenor-*defendants*, who, of course, have "defenses," not "claims."

Typically an intervenor-defendant has no ripe claims; it is intervening, in effect, to prevent any claims from arising, by resisting the plaintiff's attempt to force the defendant to do something that prejudices the intervenor-defendant's rights. Thus, it has defenses, not claims. If, as here, the defendant with whom it is initially aligned switches sides, the defenses will ripen into claims against the now-nominal defendant. Were the defendant to switch by, say, contracting with the plaintiff to acquiesce to its demands, the intervenor-defendant would be able, if it wishes, to protect its interests by challenging the contract. But if the defendant switches by stipulating to a consent decree, the intervenor-defendant still has only defenses, not claims, until the decree is entered—at which time it becomes binding and it is too late for the intervenor-defendant to assert its claims *née* defenses.

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22. As Prof. Laycock predicted, pious disclaimers of binding effect were immediately followed by the consenting parties' and the Court's use of the consent decree to foreclose claims.

Functionally, nothing of importance inheres in the distinction between "claims" and "defenses" for these purposes. An intervenor may be injured equally by loss of a claim or a defense. Which form it suffers is an immaterial accident of timing and pleading, on which nothing should depend. Contrary implications in *Firefighters* should be disclaimed.

## IV. The Use of Non-Consensual Consent Decrees Has Fostered Abuse in a Wide Range of Litigation and Systematic Violation of Third Parties' Rights, as This Case Demonstrates

What has been done to Santa Clarita in this case is typical of widespread abuse of consent decrees in recent years, abuse that will continue absent correction by this Court, which has been taken to have authorized the practice.

The use of "bilateral consent decrees in trilateral disputes," Laycock, *supra*, at 113, is driven not by a clash of reasonable litigants and obdurate intervenors, but by the opportunity that has been created for consenting parties to externalize the costs of their settlement onto non-settling parties. *Id.*, at 144. This abuse of consent decrees, invisible to the courts, has been widely acknowledged and criticized in the academic literature. See, *e.g.*, Mengler, Consent Decree Paradigms: Models Without Meaning, 29 B.C. L. Rev. 291, 332-335 (1988); Laycock, *supra*; Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal F. 19, 31 & n. 18; Cooper, The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process, 1987 U. Chi. Legal F. 155, 165; Coleman & Silver, Justice in Settlements, 4 Soc. Phil. & Policy 102, 113-114 (1986).

In the most common illustration of the practice, employees sue an employer alleging discrimination and a different group of employees intervenes to protect its members' interests in the employer's practices. The plaintiff may represent minority employees alleging discrimination or majority employees alleging reverse-discrimination. The plaintiff and the defendant are able to negotiate a bilateral consent decree precisely because they are taking from the nonconsenting intervenor. Ever since this Court held in *Firefighters* that the consent decree may be entered without proof of prior discrimination, see 478 U.S., at 532 (White, J., dissenting) and may exceed the relief that could be obtained in a contested adjudication, 478 U.S., at 525, the opportunity for litigants to agree on consent decrees at the expense of nonconsenting parties has proven irresistible.[10]

The practice is by no means limited to employment discrimination. It has been used to subvert the interests of religious groups having a free-exercise claim, *e.g.*, *Wilder v. Bernstein*, 645 F.Supp. 1292 (SDNY 1986) (children represented by ACLU and city agree to consent decree requiring religious social-service agencies to provide services without regard to religion); see also *Harrisburg Ch. ACLU v. Scanlon*, 500 Pa. 549, 458 A.2d 1352 (1983) (ACLU and state agree to consent decree prohibiting prayer meetings on school property), to eliminate water-rights claims, *e.g.*, *Steiner v. County of Marshall*, 568 N.W.2d 627 (S.D. 1997) (upstream landowners and county stipulate to consent decree diverting water from downstream lands owned by nonconsenting intervenors), to prevent financial institutions from asserting their rights, *e.g.*, *United Services Auto. Ass'n v. Foster*, 783 F.Supp. 916 (MD Pa. 1992) (approving consent decree to

[10]Indeed, economists and game theoreticians have shown how three-way competition rationally results in two competitors forming a coalition against the third. *E.g.*, J.M. Buchanan & G. Tullock, The Calculus of Consent 148-150 (1963).

which state and insurer agreed, over banks' objection, to invalidate state law prohibiting insurers from owning banks), to impose obligations on health insurers, *Ten. Ass'n of Health Maint. Orgs. v. Grier*, 262 F.3d 559 (CA6 2001) (binding managed care organizations to modifications to consent decree between state and Medicaid recipients), to erase environmental claims of community groups, *e.g.*, *Comunidades Unidas Contra La Contaminacion*, 204 F.3d, at 275 (approving consent decree over local resident intervenors' objections), to deny adjudication of challenges to segregated schools, *e.g.*, *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371 (CA8 1990) (instructing intervenor minority students objecting to consent decree abiding segregated schools to see how it works out and then to move for modification of the decree), and to reject anti-abortion challenges, *e.g.*, *Ragsdale*, 941 F.2d 501 (approving consent decree enjoining state laws regulating abortion and denying intervention to abortion opponents).[11]

The perils of this practice are illustrated by this and other cases involving local environmental regulation. Statutes like California's CEQA and the federal NEPA impose special duties on government agencies that issue permits and otherwise authorize projects that may have an impact on the environment. These duties have been legislatively imposed precisely to offset the tendency of some agencies to favor projects at the expense of the environment. Bilateral consent

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[11] A related abuse of consent decrees led the Department of Justice to issue guidelines sharply restricting the government's use of consent decrees to control the discretion of federal agencies or to abdicate executive authority. Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys, Re: Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986), reprinted in Review of Nixon Presidential Material Access Regulations: Hearings Before the Subcomm. on Government Operations, 99th Cong., 2d Sess. 1982 (1986).

decrees offer a project proponent and a compliant local agency the opportunity to relieve the agency of such special duties and to neutralize environmental legislation.

Such decrees are also inimical to the agency's regulatory function, again as this case illustrates. The County was required to hold hearings, take evidence, receive comments, and then to make findings and issue a report based on that material. Instead, it has agreed to be mandatorily enjoined to approve the Soledad Canyon project, to certify its most recent environmental impact report "without further public review or comment," to accept the adequacy of mitigation measures, to disregard any "significant new information," to adopt a statement of overriding considerations to justify environmental harm, to make findings prescribed verbatim in the consent decree, to issue all permits, and to approve Cemex's reclamation plan, App. C-22, 32, 72-80. By consenting to the decree the County has reduced itself to a puppet regime. A federal court should not allow itself to be the instrument of subversion by faithless local governments.

## V. The Proper Use of Consent Decrees Will Permit Courts to Continue to Resolve Disputes Between Settling Parties While Preserving the Valid Claims of Nonconsenting Parties

Santa Clarita recognizes the value of voluntary resolution of litigation and does not dispute the strong judicial policy in favor of settlements. *E.g.*, *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469 (CA7 2003). The limits of a bilateral consent decree in a trilateral dispute need not prevent willing parties from settling litigation, provided the settlement does not attempt also to dispose of the properly raised claim

of a nonconsenting intervenor as of right. Parties may continue to avert the unpredictable expense and demands of litigation by voluntarily entering into agreements to end a lawsuit by consent decree. As long as such decrees do not infringe the claims of an intervenor as of right, they should readily be approved by the courts. But judicial dockets cannot be cleared by pretending parties are settling disputes when in fact some parties are simply having their claims and defenses taken away.

Parties typically pursue settlements to avoid litigation costs and litigation risks. These objectives can easily be realized without sacrificing third-party rights. If a defendant wishes to settle and an intervenor-defendant will not join in a consent decree, the defendant can simply step aside and allow the intervenor to incur the costs of defense—as defendants often do. Or the defendant may contractually agree to the plaintiff's demands, allowing the intervenor-defendant to challenge the agreement and leaving the original plaintiff to defend the result. And when the plaintiff and defendant settle, they can also negotiate hold-harmless or other terms that will satisfy the defendant's desire to avoid litigation risk. These goals can be achieved without abridging the rights of intervenor-defendants as of right. The difference between these options and a bilateral consent decree is that the defendant avoids the cost of litigation without sacrificing the intervenor-defendant's rights.

This case illustrates how easily the legitimate interests of settling parties can be reconciled with the irreducible rights of intervenors as of right. The County could simply have agreed not to dispute preemption as Cemex and Santa Clarita litigated the issue. As a practical matter, such a concession by a government entity is enormously influential and well worth the bargain to the plaintiff. Or the County could have agreed contractually to approve the EIR and to issue the permits,

leaving it to Santa Clarita, if it wished, to seek judicial relief—where Cemex could agree to defend the County. In either case, Cemex would have substantially improved its position on the merits, and the County would have been free of the litigation costs, without creating a fictional "settlement" to deprive a non-settling party of its rights.

What these alternatives do not permit is what the consenting parties cannot have—the abrogation of intervenor-defendant's rights without adjudication. No defensible judicial policy favors facilitation of settlements between two parties by allowing them to appropriate the rights of non-settling parties to the lawsuit with neither their consent nor adjudication of their rights.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No.

IN THE

# Supreme Court of the United States

**CITY OF SANTA CLARITA,**
*Petitioner,*

*v.*

**COUNTY OF LOS ANGELES, CEMEX, INC., AND UNITED STATES BUREAU OF LAND MANAGEMENT,**
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## INDEX TO APPENDICES

APPENDIX A

Decision Affirming Entry of Consent Decree, United States Court of Appeals for the Ninth Circuit, Filed February 10, 2006 ..... A-1

APPENDIX B

Decision Reversing Denial of Santa Clarita's Motion to Intervene as of Right, United States Court of Appeals for the Ninth Circuit, Filed February 24, 2004 ..... B-1

APPENDIX C

Judgment, Consent Decree (Exhibits A-J Excluded), United States District Court for the Central District of California, Filed May 20, 2004 ..... C-1

Order Granting Cemex's Request for Judicial Notice and Granting Motion for Entry of Consent Decree, United States District Court for the Central District of California, Filed May 3, 2004 ..... C-85

APPENDIX D

Order Granting *Ex Parte* Application of Plaintiff CEMEX, Inc. for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Motion for Summary Judgment of City of Santa Clarita, United States District Court for the Central District of California, Filed April 8, 2004 ..... D-1

APPENDIX E

United States Constitution Amendment V ..... E-1

Federal Rules of Civil Procedure Rule 19 ..... E-2

Federal Rules of Civil Procedure Rule 23(a) & (e) E-3

Federal Rules of Civil Procedure Rule 24 ..... E-4

APPENDIX E (cont'd)
California Public Resources Code § 21081 ..... E-7
California Public Resources Code § 21153 ..... E-8
California Public Resources Code § 21168 ..... E-9

APPENDIX F
Excerpts from Second Amended Complaint for Declaratory and Injunctive Relief, Writ of Mandate, and Damages, United States District Court for the Central District of California, Filed May 10, 2002 . F-1

APPENDIX G
Answer of the City of Santa Clarita to Second Amended Complaint of Cemex, United States District Court for the Central District of California, Filed March 9, 2004 ..... G-1

APPENDIX H
City of Santa Clarita's Notice of Motion and Motion for Summary Judgment/Adjudication, United States District Court for the Central District of California, Filed April 5, 2004 ..... H-1

APPENDIX I
Excerpts from City of Santa Clarita's Opposition to Memoranda in Support of Motion to Enter Consent Decree, United States District Court for the Central District of California, Filed April 5, 2004 ..... I-1

APPENDIX J
Excerpts from Appellant's Request for Judicial Notice, United States District Court for the Central District of California, Filed December 30, 2004 ... J-1

**NOT FOR PUBLICATION**
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

**FILED**
**FEB 10 2006**
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CEMEX INC., a Louisiana corporation,
Plaintiff-Appellee,

v.

LOS ANGELES COUNTY,
Defendant-Appellee,

CITY OF SANTA CLARITA,
Defendant-intervenor-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-intervenor-Appellee.

---

No. 04-56050
D.C. No. CV-02-00747-DT

**MEMORANDUM***

Appeal from the United States District Court
for the Central District of California;
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted Feb. 7, 2006
Pasadena, California

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: **KOZINSKI, TROTT** and **BEA**, Circuit Judges.

We assume without deciding that Santa Clarita has standing to appeal the consent decree. Review of a consent decree is limited to ensuring that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982).

CEMEX's suit against the county is based on a plausible legal claim-that further county environmental review of the project was preempted. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084-86 (9th Cir.1979). The county, acting as the lead agency under California law, *see* Cal. Pub. Res.Code §§ 2728, 21067; *Cemex, Inc. v. County of Los Angeles*, 92 Fed.Appx. 457, ----, slip op. at 5 (9th Cir.2004), had sole authority to settle the case. When the parties settled, the project had undergone more than a decade of state environmental review. Rather than prolong the litigation, the parties negotiated the consent decree in good faith and at arm's length. In exchange for approving CEMEX's project, the county obtained significant environmental concessions. We thus find the decree is "fundamentally fair, adequate and reasonable." *Officers for Justice*, 688 F.2d at 625. We do not, of course, decide whether the consent decree embodies precisely the relief that would have resulted, had the case been litigated to completion. The whole point of a consent decree is that the court need not adjudicate the merits. We conclude only that the district court acted well within its discretion in approving the settlement. *See United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir.1995).

**AFFIRMED.**

The panel retains jurisdiction over all future appeals involving this mining project. The parties shall so notify the clerk promptly upon filing of all future appeals.

All pending motions are denied as moot.

The clerk is instructed to issue the mandate forthwith.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

CEMEX, INC., a Louisiana corporation,
Plaintiff-Appellee,

v.

COUNTY OF LOS ANGELES,
Defendant.

CITY OF SANTA CLARITA,
Applicant for Intervention-Appellant.

---

**No. 02-56364**
**D.C. No. CV-02-00747-DT**
**(cite as: 92 Fed.Appx. 457)**

Argued and Submitted Nov. 3, 2003
Decided Feb. 24, 2004

Appeal from the United States District Court for the Central District of California; Dickran M. Tevrizian, District Judge, Presiding.

Before: PREGERSON, FERNANDEZ, and BERZON, Circuit Judges.

## MEMORANDUM

FN * This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The City of Santa Clarita ("City") appeals the district court's interlocutory order denying its renewed motion to intervene as a defendant in an action by CEMEX, Inc., ("CEMEX"). We reverse. Because the parties are familiar with the record, we recite only the facts necessary to explain our decision.

CEMEX's action challenges the County of Los Angeles' ("County") refusal to approve, pursuant to the California Environmental Quality Act ("CEQA") and the Surface Mining and Reclamation Act, a sand and gravel mining project near the City, in Soledad Canyon. The Bureau of Land Management ("BLM") approved the project, based on a Final Environmental Impact Statement required by the National Environmental Policy Act, but conditioned its approval, *inter alia*, on the County's approval of the project under state law.

The County conducted further environmental review. As part of the process, the City exercised its CEQA right of consultation and strongly opposed CEMEX's plans to proceed with gravel mining in Soledad Canyon. Ultimately, the County refused to approve the project.

CEMEX brought an action challenging the County's refusal to approve the project. CEMEX alleged, among other things, that the County abused the local environmental review process and that such local processes are preempted by federal law. CEMEX also makes several allegations regarding the City's involvement in the County's review process. CEMEX

requests declaratory judgment finding that federal law preempts the County's review and allowing the mining operation to begin immediately. In the alternative, CEMEX asks for a judgment declaring that the County must issue a permit and all attendant approvals so that CEMEX could begin mining. Twice the City moved to intervene in the action as a defendant. The district court denied both the original and the renewed motion.

## ANALYSIS

### A. The City's Right of Consultation Under CEQA is a Legally Protected Interest Justifying Intervention.

The district court's order denying intervention as a matter of right is subject to immediate de novo review by this court. *Stringfellow v. Concerned Neighbors In Action*, 480 U.S. 370, 375-76, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987); *Arakaki v. Cayetano*, 324 F.3d 1078, 1082 (9th Cir.2003). Under Federal Rule of Civil Procedure 24(a), intervention

> shall be permitted ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This court applies a four-part test to determine whether intervention of right is appropriate: (1) the application must be timely; (2) the applicant must have a "significantly

protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair the applicant's ability to protect that interest; and (4) the existing parties will not adequately represent the applicant's interest. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir.2001). This four-part test is construed liberally in favor of applicants for intervention and guided by practical considerations rather than technical distinctions. *Id.* at 818.

### 1. The City's motion was timely.

CEMEX does not dispute that the City's motion was timely.

### 2. The City has a "significantly protectable" interest relating to the subject of the action.

The district court denied intervention because it found that the City had not demonstrated a "significant legally protectable interest" in the subject matter of the action. To demonstrate a legally protectable interest, the City must show that: (a) "the interest asserted is protectable under some law"; and (b) "that there is a relationship between the legally protected interest and the claims at issue." *Berg*, 268 F.3d at 818.

The City's strongest argument demonstrating a legally protectable interest concerns its right of consultation under CEQA. Contrary to the district court's holding and CEMEX's arguments, the City has shown that: (a) its interest in the right of consultation is protected under CEQA; and (b) that this interest is directly related to CEMEX's action.

**a. The City has a legally protectable right of consultation.**

The BLM issued a Record of Decision requiring CEMEX to comply with CEQA. CEQA confers upon the City a right to consultation with the County, the local lead agency in this case:

> [E]very local lead agency shall consult with, and obtain comments from, each responsible agency, any public agency that has jurisdiction by law with respect to the project, and any city or county that borders on a city or county within which the project is located....

Cal. Pub. Res.Code § 21153(a). In this case, the City obtains its right of consultation under CEQA because it borders on the County in which the project is located. Contrary to the district court's characterization, this right to consultation is not merely a generalized interest in environmental issues. *See Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 837-38 (9th Cir.1996); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir.1983). Rather, the right of consultation is granted and guaranteed by statute.

**b. The City's right of consultation relates to the subject matter of the action.**

The subject matter of the action is contested by the parties. The district court characterized the action as one where the underlying issues relates primarily to "whether the County has abused its administrative process and whether that process has become too cumbersome or has been used as a vehicle to delay or frustrate the intent of federal law and federal process." Even if this is true, the practical effect of a

disposition of the action may impair the City's ability to protect its right to consultation.

The "process," which CEMEX alleges was abused and employed despite federal preemption, includes the process outlined by CEQA under which the City is granted the right to consult with the County. As the City highlights, CEMEX's complaint contains several references to actions taken by the City as it consulted with the County. Thus, the City's right of consultation under CEQA is directly related to CEMEX's action challenging the County's alleged abuse of process.

CEMEX argues that federal preemption prevents the City from having a protectable interest that would allow it to intervene in the action. This argument begs the question. Whether federal law preempts the County's application of CEQA or not is a subject of the action. The City has a protectable interest in upholding the County's application of CEQA against CEMEX's allegations of abuse of process and federal preemption.

### 3. Disposition of the Action May Impair the City's Ability to Protect its Right to Consultation.

It is the practical effect of the potential dispositions that determines whether an applicant's interest would be impaired. *See United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir.2002). Regardless of the technical description of CEMEX's action, granting the relief requested by CEMEX would vitiate the City's rights to consultation by preempting any local review and allowing the gravel mining to proceed immediately despite the County's refusal to approve the project.

### 4. The County Will Not Adequately Represent the City's Interest.

CEMEX argues that the County will adequately represent the City's interest because the City and the County both oppose CEMEX's gravel mining operation. However, in determining the adequacy of representation, this court must "consider whether the interest of [the County] is such that it will undoubtedly make all the [City's] arguments; whether the [County] is capable and willing to make such arguments; and whether the [City] would offer any necessary elements to the proceedings that [the County] would neglect." *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir.1995) (citations omitted).

Although the County and the City agreed that CEMEX should not be allowed to begin its gravel mining operation, the County will not raise all of the arguments the City would raise. The City does not believe that CEQA is preempted in any way by federal law in this case. On the other hand, the County has taken a more limited position. Additionally, the City has interests in the environmental review process independent of the County's their interests may diverge. Thus, the County does not adequately represent the City for the purposes of preventing the City from intervening as a matter of right.

## B. The District Court Improperly Engaged In Issue Reduction.

The district court acknowledged that the complaint contained allegations regarding both abuse of process and federal preemption, but inappropriately claimed that the case "is not about the applicability of environmental laws." The district court is mistaken; the question of federal preemption necessarily concerns the applicability of environmental laws.

CEMEX's prayer for relief clearly states that it wishes to conduct its gravel mining operation without impediment from state environmental laws. The district court's focus on abuse of process and away from the application of environmental laws is not only mistaken, but also impermissible. *City of Los Angeles*, 288 F.3d at 399 (holding that "the district court is not free to consider the potential for issue reduction when determining whether a putative intervener has a protectable interest in the merits of the action.")

Regardless of the impermissible issue reduction, the district court incorrectly emphasized the technical distinction between procedure and substance. Even if the issues were as limited as abuse of process, the City would still have a right to intervene in the action because the practical effect of granting the relief requested by CEMEX would vitiate the City's right to consultation under CEQA.

## CONCLUSION

The City has demonstrated that it has met the four-part test for intervention of right. Additionally, the district court impermissibly engaged in issue reduction. Even if this court agreed with the way the district court characterized the underlying claims in the action, the City still has the right to intervene. We therefore reverse the district court's order and hold that the City is entitled to intervention as a matter of right under the Federal Rules of Civil Procedure, Rule 24(a).

We note that the District Court may move forward with a consent decree between CEMEX and the County. *See City of Los Angeles*, 288 F.3d at 405. In *City of Los Angeles*, we held that "although this appeal involves intervention decisions made at the onset of the case, our holding [reversing the denial of permissive intervention and intervention of right and

remanding] does not require the district court to turn back the clock or rescind the consent decree." 288 F.3d at 404-5. As in *City of Los Angeles*, "our holding does not require the district court to turn back the clock." 288 F.3d at 404. Rather, the City shall be allowed to intervene as of the date of this disposition, and to be treated as an intervenor party from that date forward. *Id.* Thus, the City shall be entitled to be heard concerning the court's approval of any consent decree proposed between the original parties, and to appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in this case.

**REVERSED.**

FERNANDEZ, Circuit Judge, dissenting.

I respectfully dissent because, even if Santa Clarita does have a protectable interest in the subject of this action, it simply has not shown that the County will not protect that interest. Indeed, the County has every reason to defend its actions regarding the conditions that it imposed on the Cemex permit, its processes in deciding so to do, and its legitimate authority.

> FN1. The best Santa Clarita can do is to point to a right to consult with the lead agency-the County-with respect to the environmental report. *See* Cal. Pub. Res. Code § 21153. It did consult. The issues in this case deal with whether the County had the power to issue the final determination it did, and whether it perverted, and will pervert, the powers that it does have. Those are far from Santa Clarita's claimed right of consultation.

Openhanded as we may be, Santa Clarita still has to show that the representation of its asserted interest may be

inadequate. *See N.W. Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir.1996); *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir.1995). It has not done so. It has not shown that any of its claims that are truly relevant to this action will be unrepresented. Mere differences about the strategy to be used in fending off Cemex's attacks are not enough. *See N.W. Forest Resource*, 82 F.3d at 838. Indeed, there is no reason to believe that Santa Clarita will have a greater interest than the County in protecting the latter's right to issue, or deny, permits. Of course, Cemex claims that it does not need any permits from the County, and that if it does, those must be issued forthwith, cannot impose requirements beyond those consistent with federal requirements, must not seek to impose even further delays and requirements pursuant to California law, or otherwise, and may only impose reasonable environmental conditions. Certainly, says Cemex, the County cannot deny a permit. All of those go to the heart of the County's own power, and are essentially remote from Santa Clarita's right to consult. There is no reason to believe that the County will not exert all reasonable efforts to protect its legitimate authority.

Santa Clarita's intervention is not required and, if past history is any indication, it is likely to generate a great deal of heat, very little light, and consist of nothing less than a pertinacious effort to stop Cemex's proposed project at all costs.

Thus, my dissent.

C-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

**ENTERED**
CLERK, U.S. DISTRICT COURT
**MAY 24 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

**FILED**
CLERK, U.S. DISTRICT COURT
**MAY 20 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

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CEMEX, INC., a Louisiana corporation
Plaintiff,

vs.

COUNTY OF LOS ANGELES and DOES 1 through 10, inclusive
Defendant.

---

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

---

CITY OF SANTA CLARITA,
Defendant-in-Intervention

---

C-2

CASE NO. CV-02-747 DT (FMOx)

**JUDGMENT**

Judgment is hereby entered consistent with the terms of the Consent Decree filed in this matter on May 3, 2004 and entered on May 6, 2004.

DATED: May 20, 2004

DICKRAN TEVRIZIAN
HON. DICKRAN TEVRIZIAN
JUDGE OF THE UNITED
STATES DISTRICT COURT

JEFFER, MANGELS BUTLER & MARMARO LLP
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Attorneys for Plaintiff CEMEX, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

**ENTERED**
CLERK, U.S. DISTRICT COURT
**MAY - 6 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

**FILED**
CLERK, U.S. DISTRICT COURT
**MAY - 3 2004**
CENTRAL DISTRICT OF CALIFORNIA
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CEMEX, INC., a Louisiana corporation
Plaintiff,

vs.

COUNTY OF LOS ANGELES and
DOES 1 through 10, inclusive
Defendant.

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UNITED STATES OF AMERICA,
Plaintiff-Intervenor

---

CASE NO. CV-02-747 DT (FMOx)

**CONSENT DECREE**
**(PROPOSED)**

Hearing Date: March 15, 2004
Time: 10:00 a.m.
Judge: Hon. Dickran Tevrizian

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CEMEX, INC., a Louisiana corporation
Plaintiff,

vs.

COUNTY OF LOS ANGELES and
DOES 1 through 10, inclusive
Defendant.

---

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

---

CASE NO. CV-02-747 DT (FMOx)

**CONSENT DECREE**

TABLE OF CONTENTS

Page

I. RECITALS AND BACKGROUND ..... 8
II. GENERAL PROVISIONS ..... 12
A. Definitions ..... 12
B Jurisdiction ..... 17
C. Agents for Service of Process and Notices .... 18
D. Parties Bound ..... 20
E. Successors and Assigns ..... 22
F. Implementation of Consent Decree ..... 22
1. Effective Date ..... 22
2. Enforceability ..... 22
3. Duration of Consent Decree ..... 29
4. Complete Agreement ..... 29
5. Incorporation by Reference ..... 30
6. Captions ..... 30
7. Authority ..... 30
8. No Admission ..... 31
9. Cooperation ..... 32
10. Release ..... 33
11. Modifications to the Consent Decree ... 33
12. Interpretation of Consent Decree ..... 33
13. Severability ..... 34
14. Waiver ..... 36
15. Attorneys' Fees ..... 36
16. Limitations as to the United States ..... 36
17. Counterparts; Facsimile ..... 36
18. Reservation of Police Power ..... 37
G. Subsequent Actions Affecting Consent Decree 37
III. STIPULATED FACTUAL BACKGROUND .... 38
A. Project Overview ..... 38
B. Federal Environmental Review of the Project . 40
C. County Environmental Review of the Project . 43
D. The Pleadings and the Parties Allegations .... 50

1. CEMEX's Allegations ..... 50
2. United States Allegations ..... 56
3. County Allegations ..... 58
IV. FINDINGS, CONCLUSIONS, AND DETERMINATIONS ..... 60
A. Federal Preemption ..... 60
B. Adequacy Of Environmental Review ..... 63
C. Public Hearing Process ..... 68
V. PARAMETERS OF PROJECT TO BE APPROVED BY THE COUNTY ..... 69
A. Federal Land Use and Environmental Decision-Making ..... 69
B. CEQA Environmental Documentation and Review ..... 71
1. The County Will Certify the November 2001 EIR Without Further Public Review or Comment ..... 71
2. The County Will Prepare and Adopt CEQA Findings ..... 73
3. The County Will Prepare and Adopt a Statement of Overriding Considerations ..... 74
C. The County Will Issue All Required Entitlements For The County-Approved Project ..... 76
1. Surface Mining Permit ..... 77
2. Reclamation Plan ..... 78
3. Financial Assurances ..... 80
VI. INJUNCTIVE RELIEF ..... 80

Plaintiff CEMEX, Inc. ("CEMEX"), Plaintiff-in-Intervention United States of America ("United States"), and Defendant County of Los Angeles ("County") have agreed to settle the litigation *CEMEX, Inc., et al. v. County of Los Angeles*, U.S.D.C. Case No. CV-02-747 DT (FMOx), in accordance with the following terms and conditions of this Consent Decree. Exhibits A through J shall be deemed to be parts of this Consent Decree and are fully incorporated by reference herein.

## I. RECITALS AND BACKGROUND

On January 25, 2002, CEMEX commenced this action alleging that the County has engaged in a course of public action intended to obstruct, delay and frustrate implementation of federal law, and a series of federal decisions, regarding the mining of federal mineral resources in the County, precluding implementation of CEMEX's Soledad Canyon Sand and Gravel Mining Project ("Project"), approved by the U.S. Department of Interior, Bureau of Land Management ("BLM"), which public action was in violation of the federal Materials Act of 1947 ("Materials Act"), 30 U.S.C. §§ 601 *et seq.* and the Federal Land Policy and Management Act, of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.* On September 10, 2002, the United States intervened as Plaintiff-in-Intervention alleging that the County has blocked the BLM's mineral materials sales to CEMEX and interfered with BLM's mineral materials sales program by continually attaching land-use restrictions and unreasonable conditions on CEMEX's use of the federally-owned mineral estate. The BLM further alleges that the County's delay and ultimate denial of a surface mining permit stands as an obstacle to the fulfillment of the congressional purposes behind the Materials Act and FLPMA.

By virtue of executing this Consent Decree, the County is not admitting liability but has determined it is in its best interest to resolve this litigation. Nevertheless, without admitting liability, the Parties consent that the Court may enter the Recitals, Findings, Conclusions, and Determinations set forth below for purposes of this Consent Decree only and any proceedings to enforce its provisions. This Consent Decree resolves all claims and defenses which were or could have been asserted in CEMEX's complaint filed in this case ("Complaint"), the United States' complaint-in-intervention filed in this case ("Complaint-in-Intervention"), and the answers filed by the County in this case ("Answers").

The BLM is committed to carrying out its mandates pursuant to the Materials Act and FLPMA. Pursuant to these statutes, and related regulations, the BLM has engaged in a series of decisions resulting in a determination to allow the mining of sand and gravel minerals from the federally-owned mineral estate. As part of this process, the BLM approved CEMEX's Project, providing for the production of 56.1 million tons of federally-owned resources located on a 460-acre parcel in the Soledad Canyon area of Los Angeles County ("Project Site"), with an anticipated royalty to the United States Government of a minimum of $28 million pursuant to and following the issuance in 1990 of two federal mineral material contracts ("Federal Contracts") to CEMEX's predecessor-in-interest, Transit Mixed Concrete Company (referred to hereafter as "TMC") and following lengthy environmental analysis and public review. True and correct copies of the Federal Contracts are attached collectively hereto as **Exhibit A**.

The BLM engaged in and completed a nearly 15-year land-use and environmental review process for the Project. This process included: (1) a Federal Court-approved

settlement in 1988, in which the BLM determined to put the Federal mineral material at the Project Site up for bid; (2) a public bid process in which up to 100 million tons of Federally-owned mineral material at the Project Site was determined to be put up for sale; (3) the award of the two Federal Contracts to TMC in 1990, providing for the mining and production of 56.1 million tons over a period of approximately 20 years; (4) further environmental analysis of Plaintiff's (then, TMC's) proposed mining Project, resulting in publication of a Federal Final Environmental Impact Statement ("Final EIS") pursuant to the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231 *et seq.*; (5) the issuance of a Federal Record of Decision (the "ROD") on August 1, 2000, approving the specific manner in which the proposed mining pursuant to the Federal Contracts is to occur, with the addition of specified mitigation measures ("Federally-Approved Project"); and (6) the affirmation of the ROD by the U.S. Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals ("IBLA").

The United States is committed to preserving and supporting the implementation of the BLM's decisions regarding the Project, as well as its overall management of federal lands.

The County is committed to carrying out what it asserts are its duties as a local lead agency under both the California Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 *et seq.*, and the Surface Mining and Reclamation Act ("SMARA"), Public Resources Code §§ 2710 *et seq. and the County's Surface Mining Permit Ordinance, L.A.C.C. § 22.56.1240 et seq.* Federal law relating to mining, as well as the federal decisions relating to the Project, preempt the County from denying the Project under the Property and

Supremacy Clauses of the United States Constitution. The County further acknowledges that actions which unlawfully conflict with, excessively delay, or otherwise frustrate implementation of the Project are similarly preempted.

CEMEX has pursued permitting and implementation of the Project for nearly thirteen years, and has incurred extraordinary costs during this process.

In addition to resolving all claims in CEMEX's Complaint filed in this case and the United States' Complaint-in-Intervention, the Parties enter into this Consent Decree to provide for the expeditious implementation of the Federally-Approved Project, including through implementation of additional conditions as agreed to herein, and to resolve CEMEX and the United States' claims without resort to continued litigation, and to avoid further costs and delay associated with such litigation.

Through this Consent Decree, the United States is guaranteed that federal laws and decisions relating to mining the Project Site are given full force and effect, while CEMEX is guaranteed that it will be able to implement the Federally-Approved Project without delay or interference by the County. The County, in turn, will avoid the extraordinary costs associated with complex and protracted litigation and a potentially adverse ruling in the underlying litigation. Additionally, the County, through this Consent Decree, will retain jurisdiction to complete its review and approval of the project as detailed herein including adoption of mitigation measures beyond those in the Federal EIS, and will also impose a number of Project Conditions not otherwise required under CEQA or SMARA that might otherwise be preempted as land use conditions.

Nothing in this Consent Decree is intended to alter the lawful exercise by the County of its police powers as provided by the United States and California Constitutions, nor to abridge its general compliance with the mandates of California law, except to the extent that County actions have or will interfere or conflict with, or otherwise frustrate federal laws and decisions relating to the field of federal mining projects, and as specifically exercised in the context of the Federally-Approved Project.

Each party represents that it is entering into this Consent Decree in good faith and in an effort to avoid expensive and lengthy litigation but without any admission or finding of liability or fault as to any allegation or matter.

## II. GENERAL PROVISIONS

### A. Definitions

The term "AEIDEIR" means the August 2000 Additional Environmental Information to the Draft Environmental Impact Report", a supplemental environmental document prepared by the County of Los Angeles pursuant to the California Environmental Quality Act.

The term "BLM" means the United States Department of Interior, Bureau of Land Management.

The term "Board" refers to the Board of Supervisors for the County of Los Angeles.

The term "CEMEX" means CEMEX, Inc. as well as its predecessors-in-interest in contract with the BLM, including Transit Mixed Concrete Company ("TMC"), and Southdown, Inc. ("Southdown").

The term "CEMEX Application shall mean the application for a surface mining permit, first submitted by CEMEX's predecessor-in-interest to the County of Los Angeles in 1991, and described as surface Mining Permit Number 91-165(5), for the Project as defined herein.

The term "CEQA" means the California Environmental Quality Act, California Public Resources Code §§ 21000 *et seq.*, and the regulations implementing that statute, located at Title 14 of the California Code of Regulations §§ 15000 *et seq.*

The term "CEQA Findings" refers to the findings and determinations made by the County relating to the extent to which the Project results in potential environmental impacts and the effect of measures imposed to mitigate those impacts as required pursuant to CEQA.

The term "Complaint" means the Complaint for Declaratory and Injunctive Relief, Writ of Mandate, and Damages, as amended, filed by CEMEX in this action.

The term "Complaint-in-Intervention" means the Complaint for Declaratory and Injunctive Relief filed by the United States of America, plaintiff-in-intervention in this action.

The term "Consent Decree" means the recitals and provisions set forth herein as stipulated and agreed to by the Parties, and which becomes effective and controlling on all Parties immediately following entry as a final judgment in this case by the U.S. District Court, Central District of California.

The term "County" means the County of Los Angeles, a subdivision of the State of California, and all its sitting

Supervisors, officers, agents, employees and all other persons associated with or affiliated with the County and acting in their official capacity relating to such association or affiliation.

The term "County-Approved Project" means:

a. The Federally-Approved Project; and
b. The environmental mitigation measures identified in the County's January 2004 Proposed Mitigation Monitoring and Reporting Plan ("January 2004 Proposed MMRP"), and
c. The Project Conditions as negotiated between the Parties during Court-ordered mediation in this case. Attached hereto as **Exhibit H** are the Project Conditions agreed to by the Parties during the course of the settlement negotiations. The Project Conditions represent additional Project requirements above and beyond the mitigation measures for the Project included as part of the County's review pursuant to CEQA, and have been agreed to by CEMEX and the United States in an effort to avoid expenses and undue delay on implementation of the Project.

The term "Court" means the United States District Court, Central District of California.

The term "DPW" means the County of Los Angeles' Department of Public Works.

The term "Effective Date" means the date this Consent Decree is entered as a final judgment by the Court.

The term "EIR" means Environmental Impact Report, as defined pursuant to CEQA and its implementing regulations.

The term "EIS" means Environmental Impact Statement, as defined pursuant to NEPA and its implementing regulations.

The term "ESA" means the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* and its implementing regulations.

The term "Federal Contracts" means the Federal Contracts for the Sale of Units of Materials No. 20139 and 22901, issued by the BLM to Transit Mixed Concrete Company, CEMEX's predecessor-in-interest, in March 1990.

The term "Federally-Approved Project" means the Project as analyzed by the BLM in the Final EIS published in June 2000, as approved by the BLK in the August 2000 Record of Decision, and as upheld by the Interior Board of Land Appeals on January 8, 2002;

The term "FLPMA" means the Federal Land Policy and Management Act, 42 U.S.C. §§ 1701 *et seq.*

The term "IBLA" means the Interior Board of Land Appeals, an appeals body within the Office of Hearings and Appeals of the U.S. Department of Interior.

The term "Lawsuit" shall mean that certian action entitled *CEMEX, Inc., et al. v. County of Los Angeles, et al.*, United States District Court for the Central District of California, Case No. CV-02-747 DT (FMOx).

The term "Materials Act" means the Materials Act of 1947, 30 U.S.C. §§ 601 *et seq.*

The term "NOI" means Notice of Intent, and is an official public notice as provided for pursuant to CEQA.

The term "NEPA" means the National Environmental Policy Act, 42 U.S.C. §§ 4231 *et seq.*, and its implementing regulations, contained at Title 40 of the Code of Federal Regulations §§ 1500 *et seq.*

The term "Parties" means CEMEX, the United States, and the County.

The term "Planning Staff" means the Los Angeles County Department of Regional Planning staff.

The term "Project" means the Soledad Canyon Sand and Gravel Mining Project, located in Los Angeles County, California, as provided by BLM Contracts for the Sale of Units of Material Nos. CA-20139 and CA-22901, including the mining and production of 56.1 million tons of Federally-owned sand and gravel on approximately 460 acres.

The term "Project Findings" refers to the findings and determinations made by the County relating to the Project's compliance with County regulations.

The term "Project Site" means the federally-owned mineral estate located on a 460-acre parcel in the Soledad Canyon area of unincorporated Los Angeles County and which is subject to the Federal Contracts.

The term "ROD" means the BLM's record of Decision for the Project, issued on August 1, 2000 pursuant to NEPA.

The term "RNFSA" means the Reduced North fines Storage Area, a section of the northern portion of the Project Site where CEMEX had intended to place excess fine materials that resulted as a by-product of mining activities.

The term "RNFSA Alternative" means the Reduced North Fines Storage Area Alternative, the Project alternative selected by BLM as the Federally-Approved Project in the ROD.

The term "SRHA" means the Stock-Raising Homestead Act, 43 U.S.C. § 299.

The term "SMARA" means the Surface Mining and Reclamation Act, California Public Resources Code §§ 1720 *et seq.*, and its implementing regulations contained in Title 14 of the California Code of Regulations §§ 3500 *et seq.*

The term "SOC" means Statement of Overriding Considerations, which identifies residual significant impacts of a project, and benefits of project implementation, as required pursuant to CEQA.

The term "TMC" means Transit Mixed Concrete Company, CEMEX's predecessor-in-interest.

**B. Jurisdiction**

The Court has jurisdiction over the subject matter and over the Parties pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, to declare and enforce the rights and other legal relations of Plaintiff CEMEX under Federal law, including the Property and Supremacy Clauses of the United States Constitution, U.S. Const. Art. IV, § 3, cl. 2 and Art. VI, cl. 2, the Materials Act of 1947, 30 U.S.C. §§ 601 *et seq.*, and regulations relating to the same, and pursuant to 42 U.S.C. § 1983 to redress the deprivation under color of statute, ordinance, regulations, custom or usage of rights, privileges and immunities secured to Plaintiff CEMEX by the Fifth and Fourteenth Amendments to the Constitution of the

United States, as well as for money damages. Jurisdiction is confirmed in this Court by 28 U.S.C. §§ 1331 and 1343(3), which confer original jurisdiction on Federal District Courts in suits to redress or prevent the deprivation of rights, privileges and immunities as stated above. Jurisdiction in this Court is also confirmed pursuant to 28 U.S.C. § 1345, which grants this Court original jurisdiction of all civil actions commenced by the United States as a plaintiff. The Court also has jurisdiction over the subject matter on the basis of supplemental jurisdiction pursuant to 28 U.S.C. § 1367, as already determined by this Court. [*See* July 30, 2002 Order Granting in Part and Denying in Part County of Los Angeles' Motion to Dismiss the Second Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted, or in the Alternative, Motion to Abstain From the Exercise of Jurisdiction, at 20:1 to 21:20.]

The Complaint filed herein states claims for which, if the allegations were proved, relief could be granted. For the purposes of this Consent Decree, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Further, all Parties consent to the jurisdiction of this Court and warrant not to contest the Consent Decree. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## C. Agents for Service of Process and Notices

All notices, requests, demands, or other communications under this Consent Decree shall be in writing. Notice shall be sufficiently given for all purposes as follows:

(1) When personally delivered to the recipient, notice is effective on delivery.

(2) When delivered by overnight delivery by Federal Express, Airborne or United Parcel Service, charges prepaid or charged to the sender's account, notice is effective on delivery, if delivery is confirmed by the delivery service.

(3) When sent by fax to the last fax number of the recipient known to the party giving notice, notice is effective on receipt, provided that (a) a duplicate copy of the notice is promptly given by first-class or certified mail or by overnight delivery, or (b) the receiving party delivers a written confirmation of receipt. Any notice given by fax shall be deemed on the next business day if it is received after 5:00 p.m. (recipient's time) or on a non-business day.

(4) When sent by United States Mail, notice is effective on receipt, after it has been deposited in the United States mail, duly registered or certified, with postage prepaid, and addressed a set forth below:

To County of Los Angeles:
County Counsel, County of Los Angeles
c/o Richard D. Weiss,
Acting Assistant County Counsel
821 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012
Facsimile: (213) 617-7182

Courtesy Copy:
Fox & Sohagi
Deborah J. Fox, Esq.

10960 Wilshire Boulevard, Suite 1270
Los Angeles, CA 90024-3702
Facsimile: (310) 444-7813

To United States of America
U.S. Department of Justice
Environmental & Natural Resources Department
c/o Edward S. Geldermann, Esq.
General Litigation Section
601 D Street N.W., Room 3126
Washington, D.C. 20004
Facsimile: (202) 305-0506

Assistant United States Attorney
Vince Farhat
Room 7516, Federal Building
300 North Los Angeles St.
Los Angeles, CA 90012
(213) 894-2872

To CEMEX, Inc.
Jeffer, Mangels, Butler & Marmaro, LLP
c/o Kerry Shapiro
Two Embarcadero Center, Fifth Floor
San Francisco, CA 94111
Facsimile: (415) 398-5584

**D. Parties Bound**

United States: Plaintiff-in-Intervention United States represents the interests of BLM, the U.S. Department of Interior, and the United States of America in this action. Under the Materials Act, the Secretary of Interior is authorized to dispose of mineral materials on public lands of the United States through a competitive bidding process. (30

U.S.C. §§ 601, 602.) This authority has been delegated to authorized agents of the BLM by the Department of the Interior Manual. Under FLPMA, the Secretary has been authorized to "develop, maintain, and, when appropriate, revise land use plans which provide . . . for the use of public lands." 43 U.S.C. § 1712(a). "Public lands" in FLPMA is defined to include "any interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management." 43 U.S.C. § 1712(e). The Secretary's land-use planning authority has been delegated to the BLM. 43 U.S.C. § 1601.0-3.

CEMEX: Plaintiff CEMEX is a Louisiana corporation qualified to do business in the State of California. CEMEX's predecessors-in-interest with respect to the Project include Southdown, Inc., dba Transit Mixed Concrete Company. The permit and other applications for the Project at issue herein were originally applied for by TMC, before its name changed to CEMEX. ("TMC" and "CEMEX" are thus sometimes used interchangeably in this Consent Decree.)

County: Defendant County of Los Angeles is a public body, corporate and politic, and a subdivision of the State of California. Pursuant to Section 23004 of the California Government Code, the County is subject to this suit. Under SMARA, the County is ordinarily responsible as "lead agency" for review of surface mining projects, including approval of reclamation plans and adoption of financial assurances. Under CEQA, the County is ordinarily responsible as local "lead agency" to analyze under State law potential environmental effects of development projects potentially affecting the environment that are subject to discretionary approvals, generally including surface mining projects.

## E. Successors and Assigns

This Consent Decree and all representations, agreements or stipulations contained herein shall constitute binding, continuing obligations between the Parties and shall inure to the benefit of and shall be binding upon the Parties hereto, by and through their officials, agents, employees and successors, and shall be binding upon their heirs, personal representatives and permitted successors in interest.

## F. Implementation of Consent Decree

### 1. Effective Date

This Consent Decree shall become effective immediately upon entry by the U.S. District Court. The County shall implement immediately all provisions of this Consent Decree, and, as expressly stated below, no later than sixty (60) days after the effective date of this Consent Decree, the County shall complete all actions relating to certification and completion of the Final EIR, adoption of Findings and the SOC, issuance of a Surface Mining Permit, and approval of a Reclamation Plan and Financial Assurances Cost Estimate, as detailed herein.

### 2. Enforceability

A Party seeking enforcement of this Consent Decree may file for an order to show cause why the breaching Party should not be held in contempt and/or subject to appropriate contempt sanctions by the Court. Any failure to timely act or comply with the obligations set forth in this Consent Decree which has a material adverse impact on one of the Parties shall be deemed a material breach of this Consent Decree.

The Court orders that this case be administratively closed pending further order of the Court. The Court expressly hereby retains jurisdiction over any actions relating to the Consent Decree, its constituent parts and related actions required pursuant thereto.

The Court further orders that if any Party reasonably believes a Party has materially breached any of its obligations under the Consent Decree, then pursuant to the Consent Decree, it may file a motion in this Court seeking such a determination. Upon making such a determination, the Court may order whatever relief it deems appropriate, consistent with the Consent Decree, where relevant.

In the event of a material breach which arises out of an intentional effort by the County to materially delay, frustrate or prevent the timely and successful implementation of the County Approved Project, then CEMEX and the United States may seek the additional remedy of making a Motion to Dissolve and Set Aside the Consent Decree and seek to reinstate the Lawsuit ("Motion to Dissolve") and to revive the Lawsuit as it existed as of the day prior to the execution of the Consent Decree. In the event a Party successfully moves to dissolve the Consent Decree, neither this Consent Decree nor any County approvals related to this Consent Decree shall be admissible for any purpose in the revived lawsuit. This additional remedy is available where the County, through its Official Policy Makers (as that term is defined herein)[1], acting

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[1] "Official Policy Makers" includes those recognized and defined under the body of case law interpreting 42 U.S.C. § 1983 which the Parties agree include at a minimum the County Supervisors, the County Counsel, Department Heads, the Chief Administrative Officer, and (for purposes of this enforcement provision) Conal McNamara, Millie Jones and Bob Haueter for so long as they remain employed by the County. The Parties hereby stipulate that the agreed-upon definition of the term

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either directly or indirectly, engages in or encourages a course of conduct intended to materially delay, frustrate or prevent the timely and successful implementation of the County Approved Project. The Parties specifically recognize as well the concept of deliberate indifference and acknowledge that this concept is also applicable in assessing the County's actions and whether a material breach has occurred under this provision. Consequently, this additional remedy is also available where the County acts with deliberate indifference with respect to the conduct of non-Official Policy Maker agents or employees.

It is specifically understood among the Parties that in interpreting the preceding paragraph, intent will be determined using an objective standard and that intent may be inferred from conduct based on the assumption that a reasonable person intends the natural and logical consequences of his or her actions.

The Parties recognize that there will be a significant gap between the time this Consent Decree was conceptualized and the time of its implementation. Conduct occurring on and

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"Official Policy Makers" and the manner in which it is interpreted and applied herein shall not constitute an admission by any Party as to the scope and meaning of the term "Official Policy Makers" under 42 U.S.C. § 1983, or any other body of law, to the extent that term may relate to claims, assertions, or defenses in the Lawsuit or any other litigation between the Parties. The Parties hereby recognize that as to the individuals named any asserted acts must be within their employment capacity while recognizing that these individuals retain certain protected First Amendment rights which are not precluded by this Consent Decree. The determination of whether conduct is protected by the First Amendment, as opposed to conduct attributable to the County under this agreement, shall be determined by a consideration of the totality of the circumstances surrounding the conduct.

after April 22, 2003 and before October 1, 2003, is defined as "Retroactive Conduct." Neither CEMEX nor the United States shall be required to disclose Retroactive Conduct.[2] If CEMEX or the United States chooses to disclose Retroactive Conduct known to them to the County on or before October 9, 2003, then CEMEX and/or the United States may use the Retroactive Conduct disclosure to support a Motion to Dissolve or other motion for contempt for violation of the Consent Decree, and the Court may consider the disclosed Retroactive Conduct in determining the County's actions. Should CEMEX or the United States pursue a Motion to Dissolve or other motion for contempt for violation of the Consent Decree, the moving Party shall be precluded from using any Retroactive Conduct known to it but not disclosed to the County by October 9, 2003. Any Motion to Dissolve or other motion for contempt for violation of the Consent Decree seeking to use undisclosed Retroactive Conduct must be accompanied by a declaration reciting how and when the undisclosed Retroactive Conduct became known to CEMEX or the United States. Undisclosed Retroactive Conduct may be used only if such declaration (together with such other evidence as the court may entertain or require) establishes to the Court's satisfaction that the undisclosed Retroactive Conduct relied upon did not become known to CEMEX or the United States until after October 1, 2003. Notwithstanding the foregoing provisions of this paragraph, no Retroactive Conduct may be used to support a Motion to Dissolve or other motion for contempt for violation of the Consent Decree and no Retroactive Conduct may be considered by the Court in determining the County's actions after expiration of 24 months following the startup of the County's Approved

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[2] The option to not disclose (and forego the use of) known Retroactive Conduct allows CEMEX and the United States to protect sources through which knowledge of such conduct was obtained.

Project.[3]

Any conduct occurring after October 1, 2003 shall be defined as "Prospective Conduct." Prospective Conduct may be used in connection with a Motion to Dissolve or other motion for contempt for violation of the Consent Decree without the need for prior disclosure by CEMEX or the United States.

The County represents and warrants that it will issue instructions to its Official Policy Makers and to its non-policy making agents and employees who are involved in any non-incidental aspect of the implementation or administration of the County Approved Project regarding its and their obligations under this Consent Decree. Further, the County specifically agrees to include Conal McNamara, Millie Jones, Bob Haueter, Frank Meneses and Tom Alexander, and the staff of each of the Board officers on this notification list. The County agrees to republish and distribute such instructions on an annual basis to its Official Policy Makers and to those individuals that have a non-incidental role in the implementation of the County Approved Project during the period of time during which this Consent Decree is in effect and being implemented. The County represents and warrants that it will take appropriate corrective action in the event it comes to its attention that any of its non-policy making employees or agents is violating the instructions given or otherwise acting in a way inconsistent with the County's obligations under this Consent Decree. The County will take such action promptly, so as to avoid or mitigate any materially adverse effect upon the County Approved Project or the implementation of this

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[3] "Startup of the County Approved Project" means when shipping off site of materials subject to royalty payment under the initial Bureau of Land Management contract commences.

Consent Decree. It is understood between the Parties that the failure to take appropriate corrective action in response to known violations of such instructions (or upon learning of any action of any agent or employee inconsistent with its obligations under this Consent Decree) will constitute deliberate indifference on the part of the County and make such action attributable to the County.

The County further represents and warrants that it will take appropriate corrective action in the event it comes to its attention that any of its Official Policy Makers are violating the instructions given or otherwise acting in a way inconsistent with the County's obligations under this Consent Decree. The taking of corrective action with respect to the actions of Official Policy Makers will not exonerate the County from the effects of those actions, but may be considered by Judge Phillips or the Court in determining the scope of the penalty on any motion to dissolve or motion for contempt violation. The taking of corrective action with respect to the actions of Official Policy Makers will not be evidence that such actions are in violation of this Consent Decree.

Prior to seeking dissolution of the Consent Decree as provided for herein, and after completion of the meet and confer process noted below CEMEX and the United States shall tender the matter to Retired Judge Layn R. Phillips for the purpose of making a non-binding recommendation to the Court as to whether or not the trigger has been satisfied to justify this additional remedy. Judge Phillips shall expeditiously render such a non-binding recommendation.[4]

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[4] In the event Judge Phillips is not available, the matter shall similarly be tendered to retired Judge John Leo Wagner for non-binding recommendation. In the event neither Judge Phillips nor Judge Wagner are available, CEMEX or the United States may apply directly to the

Although CEMEX and the United States may not move to seek this additional remedy without first seeking a non-binding determination from Judge Phillips, it is understood that CEMEX and the United States may nevertheless apply to the Court for such additional relief even in the face of an adverse recommendation by Judge Phillips. It is further understood by the Parties, that the Court may in its discretion grant or deny the Motion to Dissolve or impose a sanction less severe than dissolution of the Consent Decree.

In the event of any action, motion or proceeding among the Parties in connection with the Consent Decree, the prevailing Party shall be entitled to recover its reasonable attorneys' fees in prosecuting or defending such action, motion or proceeding.

If either Party believes that the other Party is in violation of this Consent Decree, said Party shall, if practicable, prior to commencing any action to enforce this Consent Decree, first participate in a good faith attempt to resolve said dispute, as follows:

The complaining Party shall give written notice of the asserted violation to the other Party. Said notice shall be in sufficient detail to permit the respondent to evaluate the complaint and to formulate a response. The notice shall set forth a request for a meeting regarding the asserted violation(s). Counsel for the Parties shall confer in a good faith effort to cure the asserted violation, eliminate the necessity of an enforcement action or to eliminate as many of the disputes as possible. It shall be the responsibility of counsel for the complaining Party to arrange for this conference. If all participating counsel are located within the

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Court for such additional relief.

same county of the Central District, the conference shall take place in person at the office of the moving party's counsel, unless the Parties agree to meet someplace else. If all participating counsel are not located within the same county of the Central District, the conference may take place telephonically. Unless relieved by written order of the Court upon good cause shown, counsel for the opposing Party shall confer with counsel for the moving Party within ten (10) court days of service upon him/her of a letter requesting such conference. The moving Party's letter shall identify each issue in dispute and claimed violation, shall state briefly with respect to each such violation the moving Party's position and specify the terms of the resolution to be sought. Such meet and conference process shall be in lieu of the conference of counsel requirements set forth in the Local Rules of the Central District of California.

If the asserted violation is not resolved to the satisfaction of the moving party by the conclusion of the meeting of counsel, and the moving Party does not believe that further informal attempts by counsel will affect a satisfactory resolution, the moving Party then may seek appropriate relief from the Court.

**3. Duration of Consent Decree**

This Consent Decree shall remain in place until the Federal Contracts between CEMEX and the United States have expired, or are otherwise terminated by the Parties thereto or by operation of law.

**4. Complete Agreement**

Except as expressly provided in **Exhibit H**, this Consent Decree shall constitute the entire integrated agreement of the

Parties. There are no representations or agreements between the Parties hereto relating to the subject matter contained herein other than contained in this Consent Decree. This Consent Decree (and the exhibits attached hereto and documents incorporated herein by reference) is the complete and final integration of all arrangements and agreements between the Parties hereto regarding the subject matter hereof and supersedes all prior written or oral and all contemporaneous oral representations, understandings, or agreements between the Parties regarding the subject matter hereof. Any amendment of or supplement to this Consent Decree must be in writing and executed by all of the Parties hereto. This Consent Decree shall not be construed to contain any implied covenants other than the covenant of good faith and fair dealing.

**5. Incorporation by Reference**

All of the exhibits attached hereto or referenced to herein and all documents in the nature of such exhibits, when executed, are by this reference incorporated herein and made a part of this Consent Decree.

**6. Captions**

None of the Captions of the paragraphs of this Consent Decree shall be construed as a limitation upon the language of such paragraphs, said captions having been inserted as a guide and a partial index and not as a complete index of the contents of the paragraphs.

**7. Authority**

Each Party hereby represents and warrants to the others that: (1) it has the full power, right and authority to execute

this Consent Decree and hereunder, and (2) all procedures and approvals that are necessary and required to enable it to execute this Consent Decree and perform hereunder, and to bind all individual or entities whom it represents, have been followed and/or secured.

**8. No Admission**

The existence and execution of this Consent Decree by CEMEX is not intended, and shall not be construed, as an admission by CEMEX, or any of its parent corporations, subsidiaries, or affiliates, or any of its respective officers, directors, employees, agents shareholders, representatives or affiliates, of any deficiency, limitation, liability, error, violation or omission of any nature whatsoever, including without limitation any past or current violation under CEQA, SMARA, Los Angeles County's Code, or any other Federal, State or County laws or regulations.

Nothing in this Consent Decree shall be cited to as, or be deemed, an admission by the United States that any of the Project Conditions specified in **Exhibit H**, and/or any other provision of this Consent Decree, constitute permissible environmental regulation by the County, and do not constitute impermissible state and/or local land-use regulation of the Project. Nothing in this Consent Decree shall be cited to, or be deemed an admission by the United States that this Project is subject to regulation under CEQA, SMARA and/or the County's Surface Mining Permit Ordinance, LA.M.C. 22.56.1240, and/or that the procedures required by CEQA, SMARA, and/or the County's Surface Mining Permit Ordinance, constitute permissible environmental regulation of the Project.

By entering into this Consent Decree, the County is not admitting any legal or equitable liability under any federal, state, or local statute, regulation, ordinance, or the common law, arising out of any of the occurrences alleged in the underlying complaints.

**9. Cooperation**

a. Generally. The Parties hereto agree there is a duty of good faith and fair dealing with regard to the Consent Decree and actions called for hereunder and agree to cooperate in executing any other or further documents, decisions or actions necessary to carry out the provisions of the Consent Decree.

b. County of Los Angeles. The County will complete its review and approval of the Project as detailed herein and consistent with the terms agreed to in this Consent Decree and any additional requirements imposed by the District Court in good faith and using due diligence, including the following items:

- Completion and certification of a Final EIR for the Project;
- Preparation of Findings for the Final EIR;
- Preparation of a Statement of Overriding Considerations;
- Approval of a Surface Mining Permit;
- Approval of a Reclamation Plan;
- Preparation of Findings for the Surface Mining Permit; and
- Approval of Financial Assurances.

**10. Release**

Except as otherwise provided herein, and except as to those obligations expressly assumed in this Consent Decree, and further subject to the prior execution and entry of the Consent Decree, Plaintiff and Plaintiff-in-Intervention do hereby and forever release and discharge the County from any and all causes of action, actions, judgments, liens, indebtedness, damages, losses, claims, liabilities and demands of whatsoever kind and character in any manner whatsoever arising from or attributable to the dispute described in the pending Complaint and Complaint-in-Intervention.

Except as otherwise provided herein, and except as to those obligations expressly assumed in this Consent Decree, and further subject to the prior execution and entry of the Consent Decree, the County does hereby and forever release and discharge Plaintiff and Plaintiff-in-Intervention from any and all causes of action, actions, judgments, liens, indebtedness, damages, losses, claims, liabilities and demands of whatsoever kind and character in any manner whatsoever arising from or attributable to the dispute described in the pending Complaint and Complaint-in-Intervention.

**11. Modifications to the Consent Decree**

The Parties may jointly stipulate to make changes, modifications and amendments to this Consent Decree, but such actions shall only be effective upon review and entry by this Court.

**12. Interpretation of Consent Decree**

Each of the Parties hereto has agreed to the use of the particular language of this Consent Decree (and all attached

exhibits), and any questions of doubtful interpretation shall not be resolved solely by any rule or interpretation providing for interpretation against the party who causes the uncertainty to exist or against the draftsman.

**13. Severability**

If any provision of this Consent Decree is deemed or held to be illegal, invalid or unenforceable under any present or future laws, and the deletion of such provision would not deny any Party the substance of the benefits intended to be conferred or received hereunder, such provision shall be fully severable and this Consent Decree shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof; and the remaining provisions hereof shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance herefrom. Furthermore, in lieu of such illegal, invalid, or unenforceable provision there shall be added automatically as part of this Consent Decree a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible to be legal, valid, and enforceable.

In the event that any court invalidates any aspect of the Consent Decree, then the Parties as part of their duties to cooperate as found in Section 9 of this Consent Decree, shall exhaust reasonable efforts to remedy any identified defect(s) to insure that the Parties are provided the substance of the benefits conferred under this Consent Decree. If, and only if, the noted defects are incapable of being remedied in a way that would allow for the successful implementation of the County Approved Project within a reasonable time period, after an exhaustion of the above referenced efforts, then any Party hereto may make application to the Court entering this

Consent Decree, to dissolve and set aside the Consent Decree and the provisions thereof, and if the Court, upon proper showing, grants such application, the Lawsuit shall be reinstated and revived as of the day prior to the execution of the Consent Decree. Prior to seeking such application, a Party shall tender the matter to Retired Judge Layn Phillips for the purpose of providing a non-binding recommendation to the Court on any factual determinations including: 1) the ability to remedy the defects; 2) the reasonable efforts of the Parties; and/or 3) the ability to obtain the benefit of the County-Approved Project. Judge Phillips shall expeditiously make such non-binding recommendation.[5] Although a party may not move to set aside the Consent Decree before first obtaining a non-binding recommendation from Judge Phillips, it is understood that a Party may nevertheless apply to the Court to set aside the Consent Decree even in the face of an adverse recommendation by Judge Phillips. The purpose of this recommendation is to provide both the Parties and the Court with the views of the retired judge who assisted the Parties in reaching this Consent Decree before any Party moves to set it aside. In making the factual determination as to whether the benefit of the County Approved Project is retained, the determination shall focus on whether the efforts to correct any defects on remand have been unreasonably delayed, or to the extent the project is approved, whether the project has been approved in substantial conformance with the conditions found at **Exhibit H**. In the event that both Retired Judge Layn Phillips and Retired Judge John Leo Wagner are unavailable to render a non-binding recommendation, a party

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[5] In the event Judge Phillips is not available, the matter shall similarly be tendered to retired Judge John Leo Wagner for non-binding recommendation. In the event neither Judge Phillips nor Judge Wagner are available, CEMEX or the United States may apply directly to the Court for such additional relief.

may move to set aside the Consent Decree without first having to seek a non-binding recommendation.

**14. Waiver**

Neither this Consent Decree, nor any of the terms hereof, may be waived, discharged, modified, or amended orally, but rather only by an instrument in writing signed oy the Party against whom any such waiver, discharge, modification or amendment is sought.

**15. Attorneys' Fees**

Each side shall bear its own attorneys' fees and costs in this underlying litigation that is the subject of the Complaint and the Complaint-in-Intervention.

**16. Limitations as to the United States**

Nothing in this Consent Decree shall be interpreted as, or shall constitute, a commitment or requirement that the United States, or any party or agency thereof, obligate or pay funds, or take any other action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

Nothing in this Consent Decree shall be construed to deprive a federal official of authority to comply with all applicable federal statutes and regulations, or to revise, amend or promulgate regulations.

**17. Counterparts; Facsimile**

This Consent Decree may be executed simultaneously or in any number of counterparts, each of which shall be deemed

an original, but all of which together shall constitute one and the same Consent Decree. Facsimile signatures on this Consent Decree shall be binding as if original.

### 18. Reservation of Police Power

Subject to the express limitations and obligations set forth in this Consent Decree, nothing shall prevent the County from exercising its police power in order to protect the health, safety and welfare of the public, and, subject to the foregoing limitations, the County does herein reserve the right to take any lawful enforcement action predicated on the same. Nothing in this provision shall be construed as authorizing the County to take action that is preempted by federal law.

## G. Subsequent Actions Affecting Consent Decree

The Parties hereby agree to defend the provisions of this Consent Decree and further specifically agree not to knowingly and materially facilitate, induce or assist in the bringing or prosecution of any administrative or judicial challenges to the Consent Decree or the County Approved Project, including without limitation, through actions taken to influence the South Coast Air Quality Management District or other agencies with regulatory authority over the County Approved Project.

The Parties shall timely notify each other of any court or administrative challenge to this Consent Decree, or any challenge to the successful implementation of the County Approved Project. In the event that any provision of this Consent Decree is challenged in any local or state court, removal to the federal court entering this Consent Decree shall be sought by the Parties. The terms and obligations of this paragraph shall be in addition to, and shall not modify, the

obligations set forth as Condition 3 of the Project Conditions set forth in **Exhibit H**, attached hereto.

## III. STIPULATED FACTUAL BACKGROUND

### A. Project Overview

The Project Site is a "split estate" in which the mineral estate is owned by the United States of America, and the surface estate is now held in private ownership, following the Federal Government's transferring, also known as "patenting", of the surface estate into private ownership in 1934, pursuant to the Stock-Raising Homestead Act of 1916, 43 U.S.C. §299 "SRHA").

The Project Site is located in the Soledad Canyon area of unincorporated Los Angeles County, approximately 30 miles from downtown Los Angeles. In 1987, the Project Site and adjacent areas were formally designated by the State of California, State Mining and Geology Board as a "Regionally Significant Construction Aggregate Resource Area" pursuant to SMARA. This designation was based upon the quality of the mineral material, and the need for and diminishing availability of such material in the region. State designation seeks to protect identified important mineral resources from permanent loss due to encroachment by urbanization.

Under the Materials Act the Secretary of the Interior is authorized to dispose of mineral materials on public lands of the United States through a competitive bidding process. (30 U.S.C. §§ 601, 602). This authority has been delegated to authorized agents of the BLM. (*See* 43 C.F.R. Subpart 3610). In 1989, the BLM offered for competitive sale the rights to mine up to 100 million tons of Federally-owned sand and gravel aggregate material on the Project Site.

The BLM's decision to offer the aggregate material for sale followed a 1983 U.S. Supreme Court ruling clarifying that gravel is a mineral reserved in the Federal "mineral estate" under the SRHA. (*Watt v. Western Nuclear,* 462 U.S. 36, 103 S.Ct. 2218 (1983)). At that time, an existing mining operator, Canyon Country Enterprises, Inc., dba Curtis Sand and Gravel ("Curtis"), was mining the Project Site without any federal authorizations. The United States engaged in a series of actions against Curtis for mineral trespass and related claims, resulting in a 1988 settlement with Curtis of the mineral trespass claim, the terms and implementation of which were subsequently upheld by the Ninth Circuit Court of Appeals. The County was not involved in the prior lawsuit with Curtis.

In 1989, the BLM prepared an Environmental Assessment pursuant to NEPA for the Notice of Sand and Gravel Sale, analyzing the sale and removal by truck transportation of up to 100 million tons of sand and gravel, after specifically consulting with the County of Los Angeles Department of Public Works ("DPW") in the development of the analysis. As stated in the 1989 Environmental Assessment, the decision by the Federal Government to allow further mining to continue at the Project Site, and thus to put the material up for competitive bid, was based on the following: (1) resolution in 1988 of the Curtis trespass litigation, (2) the 1987 State designation of the mineral resources at the Project Site; (3) the County's identified need for construction aggregate material; and (4) the years of prior mining, from 1968 to 1988, consistent with the established County zoning at the Project Site for mining.

In September 1989, the BLM determined CEMEX (then TMC) to be the successful bidder, and in March 1990, the BLM issued the two Federal Contracts to TMC, conferring upon TMC the right to produce and sell approximately 56.1

million tons of sand and gravel.

In 1991, following an unsuccessful District Court challenge by Curtis, the Ninth Circuit upheld the validity of the bid process and the award of the Federal Contract to TMC.

**B. Federal Environmental Review of the Project**

In May 1990, as part of the implementation of the Federal Contracts, TMC submitted to the BLM for review a proposed mining and reclamation plan allowing for aggregate mining and production of ready-mixed concrete from the Project Site. On October 16, 1995, the BLM published in the Federal Register a Notice of Intent ("NOI") to prepare a Draft EIS pursuant to the provisions of NEPA, to analyze the potential environmental impacts of the proposed action.

On January 14, 1998, following formal consultation with the BLM pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, the U.S. Fish and Wildlife Service ("Service") released its "Biological Opinion for Transit Mixed Concrete's Application to Mine Sand and Gravel in Soledad Canyon" ("1998 Biological Opinion") which is incorporated into this Consent Decree by this reference. The 1998 Biological Opinion addressed possible impacts of the Project on the unarmored threespine stickleback fish (*Gasterosteus aculeatus williamsoni*) ("UTS"), and found that the Project was not likely to jeopardize the continued existence of the UTS. The 1998 Biological Opinion included a statement allowing for "incidental take" of this species.

In April 1998, CEMEX informed the County of its position that the on-going delays by the County in the County's concurrent environmental review process were delaying the BLM EIS process.

On June 2, 2000, the BLM completed and published the Final EIS for the Project, consisting of eight volumes and over 2,000 pages. The Final EIS, which is incorporated into this Consent Decree by reference, incorporated changes and additional mitigations based on public comments received on the Draft EIS, a Supplemental Draft EIS ("SDEIS"), and technical appendices, including a formal "conformity determination" and accompanying analysis that the Project is in conformity with all applicable Federal and state air quality regulations. The Final EIS concluded that all potential adverse impacts were mitigated to a level of less than "significant" but for two: air quality and visual. The Final EIS not only included written responses to written and oral public comments on the Draft EIS and SDEIS, but also included responses to comments on the Los Angeles County Draft EIR for the Project, which was being prepared contemporaneously.

On August 1, 2000, the BLM published its Record of Decision ("ROD"). A true and correct copy of the August 1, 2000 Record of Decision is attached hereto as **Exhibit B**. A "record of decision" documents a Federal agency's decision-making process, e.g., for an "approval", including the considerations and factors leading up to the ultimate decision, with respect to an application for permit or other such agency action. The Rod approved the following components collectively comprising the Federally-Approved Project:

- A Reduced North Fines Storage Area Alternative ("RNFSA Alternative"), allowing for extraction and processing of 56.1 million tons of sand and gravel by TMC over approximately 20 years, in conformance with the Federal Contracts issued in 1990;

- A Mining and Reclamation Plan as described in the Final EIS, consistent with the RNFSA Alternative;

- Incorporation of the terms and conditions of the 1998 Biological Opinion for the UTS, and a Habitat Protection Plan included in the Final EIS;

- Findings that traffic impacts were minimized, thereby allowing delivery of said mineral material product to the market by way of truck transportation;

- Findings that water resources were adequately protected, thereby allowing diversion of water from the Santa Clara River;

- Findings that the Project as approved conformed with all applicable local, State and Federal laws, regulations and statutes pertaining to air quality; and

- Findings that public health and safety are protected, based on coordination and fact-finding with agencies and organizations including the South Coast Air Quality Management District, the U.S. Environmental Protection Agency, and the Southern California Association of Governments.

In September 2000, various Project opponents filed appeals of the ROD with the IBLA.

In May and June of 2001, biologists hired by Project opponents discovered arroyo toad (*Bufo Californicus*) tadpoles, a Federally-listed species under the ESA, in the Santa Clara River in a portion of the Project Site. Following

this discovery, the BLM re-initiated consultation with the Service pursuant to the ESA, and issued a Supplemental Biological Assessment on August 6, 2001. Following this, the Service issued a new Biological Opinion ("2001 Biological Opinion"), which is incorporated herein by this reference, finding that the Federally-Approved Project was not likely to jeopardize the continued existence of the arroyo toad.

On January 8, 2002, following fifteen months of extensive briefing and review, the IBLA published a decision affirming the ROD and the BLM's analysis of the environmental impacts of the Federally-Approved Project under NEPA. (**Exhibit C** hereto)

## C. County Environmental Review of the Project

The County's environmental review under CEQA began in May 1991, when TMC submitted to the County an application for a surface mining permit and approval of a reclamation plan, in accordance with SMARA and the County's surface mining permit ordinance.

In 1993, a "Screencheck" (i.e., internal or administrative) Environmental Impact Report ("EIR") for the Project was prepared by TMC in accordance with CEQA and submitted to the County Department of Regional Planning ("Planning Staff"). The Screencheck EIR was subject to extensive environmental review over a number of years by the County. In response to County comments, an updated mining and reclamation plan was submitted to the County in 1996.

Beginning in 1995, both the BLM, on at least one occasion, and TMC, on several occasions, urged the County to prepare a joint environmental document in compliance with both NEPA and CEQA in order to avoid unnecessary delays

and costs, but the County rejected this suggestion on multiple occasions.

The County environmental review went through a long review process beginning in 1991 and continuing through 2001. CEMEX alleges that adding to the delay was the County's review of the Bee Canyon mobile home project and a site adjacent to the Project Site, which was at one time proposed on a portion of the Project Site, and which potentially conflicted with development of the Project, including removal of 400,000 tons of Federally-owned mineral from the Project Site. The Bee Canyon mobile home project was finally taken off calendar in part due to CEMEX's and the BLM's opposition.

In February 1999, a completed Draft EIR was then circulated by the County for nine months of public review and comment between February 1999 and November 1999, more than seven months longer than the 45-day review period required under CEQA.

A document entitled Additional Environmental Information to the Draft EIR document ("AEIDEIR") was later prepared in August 2000, and circulated for a 60-day public review period (until October 17, 2000), and the County noticed a public hearing on the CEMEX appeal and County AEIDEIR for October 24, 2000. The AEIDEIR was prepared in order to make the Project description in the County's EIR consistent with the BLM's published June 2000 Final EIS and approved August 2000 ROD, by re-describing the proposed Project to now consist of the previously analyzed RNFSA Alternative, i.e., the Federally-Approved Project, which had been recommended for approval by the County Planning Staff back in April 1999, and thus provided only limited new environmental analysis beyond what was presented to the

Planning Commission or in the BLM's Final EIS.

Eight years after CEMEX submitted its application to the County in 1991, the hearing process before the County formally began with the Planning Commission in April 1999.

In April 1999, County Planning Staff issued a Staff Analysis for the Project, wherein it recommended approval of the RNFSA Alternative, i.e. the Federally-Approved Project, based on the Draft EIR and County Staff's conclusion that it was the most feasible "environmentally superior alternative" for the proposed Project. The Staff Report prepared by the County's professional Planning Staff recommended approval in part based on the following: the need for additional permitted aggregate resources in Los Angeles County; the State of California's designation of Soledad Canyon area (including the Project Site) as a regionally significant mineral resource; and the fact that the Project would provide needed material with fewer truck miles traveled and fewer air emissions than aggregate sources in more distant locations.

A total of over thirteen months of "formal" public commenting under CEQA has been conducted for the Project, which is in addition to the over eight months of "formal" public review and comment for the various BLM EIS documents from May 1999 to January 2000.

Following a public hearing process which spanned seven hearing sessions over many months and allowed for public testimony on the Project, the Planning Commission voted to deny the surface mining permit application for the Project.

On March 13, 2000, CEMEX appealed the Planning Commission's action to the Los Angeles County Board of Supervisors ("Board").

On October 17, 2000 the Board extended the AEIDEIR comment period for another 60 days, until December 26, 2000, and continued the hearing process for three months, until January 23, 2001, notwithstanding the fact that no new information was added.

In the minute order for the January 23, 2001 public hearing session, the Board instructed the Planning Staff to close the public hearing with respect to further environmental comments on the CEMEX Application "as described to date," and to prepare a Final EIR and Statement of Overriding Considerations ("SOC")

However, the Board voted to continue the hearing for another three months, until April 24, 2001, after CEMEX expressed its willingness to meet with project opponents, the City of Santa Clarita and community representatives, to discuss possible Project modifications and mitigation measures.

Between January 2001 and April 2001, CEMEX engaged in a series of compromise negotiations with various project opponents, City and community members. These negotiations did not produce a settlement.

On April 24, 2001, the Board conducted the next session of its continued hearing on the Project, at which the Board indicated an "intent to deny" (not approve) the Project, but directed its Planning Staff to report back to the Board at a scheduled June 26, 2001 hearing with a detailed analysis of various Project "mitigation measures" proposed by Project opponents, City and community members. Pursuant to this directive, the Planning Staff requested that CEMEX provide detailed information on these mitigation measures.

Prior to the scheduled June 26, 2001 public hearing, as discussed above, biologists hired by Project opponents (the City of Santa Clarita) located arroyo toad tadpoles on the Project Site. Based on this discovery, CEMEX requested the June 26 hearing to be continued for thirty days to allow the BLM to consult with the Service under the ESA. The County Director of Planning, however, requested a sixty day continuance. At its June 26 public hearing, the Board continued the hearing to August 28, 2001.

On August 7, 2001, an item was placed on the Board's calendar to continue the Project hearing because the federal government had not completed its analysis of the arroyo toad. CEMEX requested to be heard on the item. Following this discussion, the Board determined to continue the hearing until November 27, 2001.

On November 5, 2001, the Planning Staff issued a Report ("November Staff Report") analyzing the conditions and mitigations proposed by the Project opponents, City and community members. The Executive Summary in the November Staff Report contained a statement from County Counsel discussing the legal relationship between the limited County environmental review process and the Federal Government's land-use decision-making process regarding Federal resources.

On November 13, 2001, the County publicly distributed a proposed Final EIR which included a discussion regarding the arroyo toad and the Planning Staff considered this environmental document adequate for certification under CEQA.

During the November 27, 2001 public hearing, the Department of Public Works, for the first time, publicly

articulated concerns relating to the traffic analysis used in the EIR, which analysis had been under review by the County for over three years. Based on this, the Board voted again to continue the public hearing for the Project. A week later, during a December 4, 2001 hearing of the Board, the Board voted to continue the Project.

On December 20, 2001, the County sent a letter to CEMEX informing CEMEX of various concerns the County had regarding the traffic analysis. CEMEX and the County exchanged several letters over the next few months relating to the County's traffic demands.

On January 25, 2002, CEMEX filed the Complaint in this action.

In February 2002, the County DPW prepared a report and "provisional" analysis seeking to apply an alternative traffic methodology ("New DPW Methodology") for the Project's traffic analysis different than the methodology contained in the November 2001 proposed Final EIR (" EIR Traffic Methodology") which previously had been considered adequate by the County Staff including DPW. Under the New DPW Methodology, new potential traffic impacts on Soledad Canyon Road were identified by DPW. Also in February 2002, Planning Staff prepared a report recommending Project denial in light of the DPW report.

On February 25, 2002, the day before the hearing on the Project, CEMEX submitted to the Board a detailed letter responding to the February 2002 DPW and Planning Staff reports, and establishing the validity of the EIR Traffic Methodology, including substantial additional documentation to that effect.

On February 26, 2002, the Board conducted the last session of its public hearing on the Project, and voted 5 to 0 to indicate its intent to deny the Project as reflected in the February 26, 2002 minutes of the Board of Supervisors. Little if any attention was given at the hearing to the new information contained in CEMEX's February 25, 2002 submittal.

As of the February 26, 2002 hearing, there were approximately nineteen continued public hearing sessions on the CEMEX Application before the Regional Planning Commission and the Board of Supervisors, including at least ten public hearing sessions with public comment and/or testimony.

On or about March 8, 2002, the County released Minutes of the Board's February 26, 2002 public hearing, describing the Board's vote to close the public hearing and indicate its intent to deny the applicant's (CEMEX's) appeal and to deny the permit as currently presented to the Board, and instructing County Counsel to prepare findings for denial. Thus, the Board twice, on April 24, 2001 and on February 26, 2002, voted its intent to deny the CEMEX Application following the Regional Planning Commission's vote to deny the CEMEX Application in February 2000.

On April 18, 2002, the County Counsel released its proposed "Findings of the Board of Supervisors and Order – Surface Mining Permit Number 91-165(5)," consisting of some thirty pages of findings, conclusions, and an order for denial of the Federally-Approved Project (collectively, the "Findings").

On April 23, 2002, the Board adopted the Findings and thereafter, the Board released minutes containing the order

formally denying the Project.

Following the County's denial of the Project in April 2002, CEMEX filed a "protective" appeal with the State Mining and Geology Board ("SMGB"), in order to ensure exhaustion of administrative remedies, while asserting in the appeal that the SMGB lacked jurisdiction to hear the appeal due to preemption and other federal issues underlying CEMEX's challenge to the County's denial. Over the County's objections, the SMGB agreed with CEMEX, concluding that the SMGB lacked jurisdiction, and dismissed the protective appeal. In its formal decision issued on May 22, 2002, the SMGB Chairman further concluded that "the public record indicates delay and indecision by Los Angeles County in its processing of this surface mining application. The County's conduct in this area is surprising given the surface mining infrastructure already developed and surface mining history of the mineral lands in question. . ."

## D. The Pleadings and the Parties Allegations

### 1. CEMEX's Allegations

- CEMEX's Complaint seeks declaratory and injunctive relief to prevent the ongoing interference with and frustration of the implementation of the Federally-Approved Project. Alternatively, CEMEX's Complaint seeks damages for violations of CEMEX's constitutional rights.

- CEMEX's Complaint alleges that the County's continued delay, frustration, and ultimate denial of the Federally-Approved Project are preempted by federal law as well as federal decisions determining whether to mine, and the nature, scope and extent

of mining of sand and gravel at the Project Site and implementing these Federal laws and decisions through the Federally-Approved Project. CEMEX's Complaint further alleges that the County engaged in a process designed to result in a "de facto" denial of the Federally-Approved Project through a seemingly endless politically-driven review process before the County, including nearly a decade of environmental review, multiple series of delays, changing and inconsistent environmental review standards, excessive, unreasonable and infeasible proposed Project conditions, and multiple expressions of intent to deny local approval of the Federally-Approved Project.

- CEMEX's Complaint alleges that on April 12, 2002, CEMEX filed its First Amended Complaint following the Board's February 26, 2002 vote of intent to deny the Federally-Approved Project on alleged procedural grounds, identifying CEMEX's filing of this underlying action and CEMEX's so-called "non-cooperation" as precluding the County from completing the environmental review process and thus warranting denial of the Federally-Approved Project.

- CEMEX's Complaint alleges that on May 10, 2002, CEMEX filed its Second Amended Complaint following the Board's adoption of an order to deny the Federally-Approved Project, accompanied by findings supporting the denial that now articulated substantive grounds for the denial (compared to the previous alleged procedural grounds for the vote of intent to deny).

- CEMEX's Complaint alleges that the County improperly sought to circumvent Federal laws and decisions and to frustrate implementation of the Federally-Approved Project by engaging in, under the auspices of the environmental review process, a series of pretextual actions for the purpose of achieving project delays. CEMEX's Complaint alleges that the County further utilized the environmental review process to add an ever-growing number of mitigation measures and conditions to the Federally-Approved Project in an effort to frustrate its implementation. Among them included the imposition of new mitigation measures and conditions that would, if applied, be in direct conflict with the plan of mining operations in the Federally-Approved Project.

- CEMEX's Complaint alleges that the County repeatedly attempted to engage in inappropriate land use decision-making for the Federally-Approved Project, notwithstanding the preemptive effect of federal mining laws and relevant federal approvals, including the ROD approving Federally-Approved Project. CEMEX's Complaint details how the County repeatedly subjected the Project to analysis to consider various alternatives to the Project that would have made implementation of the Federally-Approved Project infeasible, including: the use of "rail-haul" (i.e., transportation of mined sand and gravel from the Project Site by way of a new rail line instead of by truck); as well as reduction in the overall quantity of sand and gravel to be mined and produced (in conflict with the Federal Contracts and ROD which authorize mining and production of 56.1

million tons of production).

- CEMEX's Complaint further alleges that during a November 2001 public hearing on the Federally-Approved Project, the County improperly questioned the validity of the EIR Traffic Methodology, notwithstanding the fact that the EIR Traffic Methodology at that time was known to the County in the EIR for many years and was one of two acceptable traffic methodologies used in the County, and notwithstanding the fact that the Planning Staff and DPW staff had authorized use of the then-existing EIR Traffic Methodology in 1997.

- CEMEX's Complaint details events at that November 2001 public hearing and thereafter demonstrating that further review by the County would be futile and would result in further frustration of the Federal approvals, including allegations that segments of the Board appeared to be exerting political influence over County staff to compel re-examination of traffic impacts, even though this issue was previously analyzed over a period of years. CEMEX's Complaint alleges that this effort was made in order to try to create further delays and as a pretext to impose onerous and anti-competitive project conditions (e.g., rail-haul) that could not be implemented without conflicting with the existing Federal decisions, notwithstanding the fact that the County's own attorneys publicly acknowledged that conditions that frustrated or rendered infeasible the Federal decisions were impermissible.

- CEMEX's Complaint alleges that the Board ultimately denied the Federally-Approved Project on alleged procedural grounds relating to the last minute change in traffic methodology, even though the Board's findings in support of the denial purported to support project denial based on substantive grounds, and even though the Board had voted its intent to deny on February 26, 2002 based on alleged procedural deficiencies absent discussion of the aforementioned substantive issues. CEMEX's Complaint alleges that the County made these substantive findings supporting denial even though no public hearing or other process had been conducted to reach these conclusions.

- CEMEX's Complaint alleges that the County's actions, including delay of hearings on the Federally-Approved Project, excessive environmental review, shifting standards of review, and other conduct, has deprived CEMEX of due process of law as provided by the United States Constitution and in violation of Section 1983 of Title 42 of the United States Code of Laws.

- CEMEX's Complaint alleges that the County and its officers acting under color of law, have sought to impose conditions and requirements on CEMEX and the Federally-Approved Project, and have subjected CEMEX through its review of the Federally-Approved Project to a review process, substantially different from that imposed on similarly situated applicants, thus denying CEMEX equal protection of law in violation of the United States Constitution and Section 1983 of Title 42

of the United States Code of Laws.

- CEMEX's Complaint alleges that pursuant to the requirements of CEQA, the County was required to certify a Final EIR for the County-Approved Project within one-year's time from the date CEMEX submitted a complete application. CEMEX's Complaint alleges that CEMEX (then, TMC), submitted its application for a surface mining permit and reclamation plan in May 1991, but that the County never certified a Final EIR for the Project, in violation of CEQA's one-year requirement.

- CEMEX's further alleges that principles of federal preemption, based on federal law and the federal decisions implementing the Federally-Approved Project, preclude a protracted County environmental review process including with regard to certifying the Final EIR.

- CEMEX's Complaint alleges that the County's actions in delaying and ultimately in denying the Federally-Approved Project, amounted to a violation of the Takings Clause of the United States Constitution by depriving CEMEX of all economically beneficial use of its property interest in the Federal Contracts with the United States and the ROD, including all the conditions, decisions and approvals relating thereto, and that such action further violated Section 1983 of Title 42 of the United States Code of Laws.

- CEMEX's Complaint alleges that the County's actions in delaying and ultimately denying the

Federally-Approved Project amounted to inverse condemnation in violation of the California Constitution, Article 1, Section 9.

- CEMEX's Complaint seeks declaratory and injunctive relief either preempting further County review of the Federally-Approved Project, or alternatively, judgment declaring that the County must issue a surface mining permit and reclamation plan, consistent with the terms and conditions in the Federal Contracts and ROD.

- CEMEX's Complaint seeks damages for violations of due process, equal protection and inverse condemnation, or alternatively, under the Takings Clause of the U.S. Consitution.

**2. United States Allegations**

- Plaintiff-in-Intervention United States, on behalf of the BLM, intervened as a plaintiff in this action to protect its interests in the Federally-owned sand and gravel mineral materials at the Project Site, as well as its interests in royalty payments from CEMEX, and its interests in the various federal approvals for the Federally-Approved Project.

- In its Complaint-in-Intervention, the United States alleges that the County may impose only limited environmental regulations on the Federally-Approved Project, and that the County may not exercise environmental authority over the Federally-Approved Project in such a manner as to veto the BLM Federally-Approved Project, impose unreasonable restrictions on the Federally-

Approved Project, or indefinitely delay final environmental review of the Federally-Approved Project.

- In its Complaint-in-Intervention, the United States alleges that the County may not lawfully, in the name of environmental regulation, engage in land-use regulation of federally-owned property, including the federal mineral estate on which the Federally-Approved Project is located.

- In its Complaint-in-Intervention, the United States seeks to prevent the County from "further interference" with the Federal Contracts. The United States alleges that by engaging in unreasonable delay in completing its purported environmental review of the Federally-Approved Project, and by denying CEMEX's application for a surface mining permit, the County has effectively blocked the BLM's mineral materials sales to CEMEX, and that the County has also interfered with the BLM's mineral materials sales program by seeking to impose land-use restrictions and other unreasonable conditions on CEMEX' use of the federally-owned mineral estate authorized by the BLM.

- In its Complaint-in-Intervention, the United States alleges that the County's delay and ultimate denial of a surface mining permit stands as an obstacle to the fulfillment of the congressional purposes behind the Materials Act and FLPMA, and thus is preempted by federal law.

- In its Complaint-in-Intervention, the United States seeks declaratory and injunctive relief preempting the County's denial of CEMEX's surface mining permit application, as well as preempting the County's efforts to implement State and local land use policies on the federally-owned mineral estate.

- In its Complaint-in-Intervention, the United States seeks declaratory and injunctive relief preempting the County's unreasonable delay in processing CEMEX's surface mining permit application.

**3. County Allegations**

- The county alleges that it has not unreasonably delayed this matter, and asserts that the Federal approval process took considerable time to complete, and that CEMEX has acknowledged that large mining projects may take up to ten years to be permitted.

- The County alleges that CEMEX's proposed mining Project was not treated differently from similarly situated projects, that this Project to mine 56 million tons of marketable sand and gravel over a 20 year period is larger in scale than prior County mining projects, and that CEMEX was not intentionally singled out for unequal treatment for impermissible or arbitrary reasons.

- The County alleges that its denial of the CEMEX Application was based in part on Plaintiff's failure to demonstrate that the CEMEX Application met applicable State and County requirements, as well as Plaintiff's failure to cooperate in the

recirculation of the EIR for the Project, as required by CEQA. On January 25, 2002, the applicant initiated litigation in federal court against the County regarding its consideration of the applicant's surface mining permit application. Among other things, the Plaintiff sought injunctive and mandate relief to require the County to certify the FEIR in its present form and to prevent the County from further evaluating the environmental impacts of the CEMEX Application, or from conducting further environmental analysis and/or, from recirculating any additional environmental traffic documentation regarding the CEMEX Application.

- The County alleges that it did not seek to prohibit all mining on the site or reclassify the site's land use designation. Rather, the County alleges it sought to regulate the proposed mining use pursuant to its police powers, as they relate to the application of reasonable environmental and resource-protective measures.

- The County alleges that CEMEX's substantive due process claim fails as a matter of law.

- The County alleges that CEMEX's procedural due process claim is not ripe.

- The County alleges that Plaintiff's causes of action for taking and inverse condemnation are not ripe, and that Plaintiff has no vested property interest in obtaining a land use permit.

## IV. FINDINGS, CONCLUSIONS, AND DETERMINATIONS

The Parties hereby stipulate and determine as follows:

### A. Federal Preemption

As a matter of law, federal laws and regulations, and federal decisions, have preemptive effect over state law and process when those processes unlawfully conflict with or frustrate the federal decisions. See, e.g., *United States v. Shimer*, 367 U.S. 374, 381 (1961); *see also General Motors v. Abrams*, 897 F.2d 34 (2nd Cir. 1990); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084-87 (9th Cir. 1979). State regulatory process may also be preempted by conflict with federal law. *N.E. Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001).

For example, a protracted state process may impose such hardship, cost, frustration and uncertainty as to be "sufficient to thwart the federal determination . . . ." *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993).

It is the County's position that BLM's mineral materials sale to CEMEX is subject to the authority of *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 575, 107 S.Ct. 1419, 1422, 94 L.Ed.2d 577 (1987), and that the County is entitled to impose reasonable environmental and resource protective regulation on the Project pursuant to SMARA and CEQA. The United States and CEMEX contend that the County has no land-use authority over the Project, and do not concede that the preemption analysis of *Granite Rock* applies to BLM mineral materials sales. The United States and CEMEX enter into this Consent Decree without waiving the right to argue, in any subsequent litigation

involving the Project (including this Consent Decree), alternative theories concerning whether the state has authority to regulate BLM's performance of a federal function in relation to BLM-administered lands (including federally owned mineral estates) under the Materials Act of 1947.

It is unnecessary for the Court to decide whether the preemption analysis of *Granite Rock* applies to this case, because all Parties agree that, at a minimum, any County regulation of the Project that goes beyond the imposition of reasonable environmental conditions in a timely manner thereon is preempted by federal law under any applicable standard. Because the Court finds that the County has exceeded its alleged authority in this regard, the Court determines that the County is preempted from further regulation of the Project except as outlined in this Consent Decree.

Notwithstanding the preemptive effect of federal laws and decisions on the County's ability to frustrate the Federally-Approved Project, in the interest of a quick resolution of this action, CEMEX has agreed through this Consent Decree, to the imposition of various conditions on the Federally-Approved Project. These conditions have been agreed to by the Parties.

On multiple occasions before 1996, the County was invited to join with BLM to conduct a coordinated federal-state environmental review, and the County declined all such invitations. In this case, the County has already conducted lengthy review of the Project pursuant to the requirements of CEQA and SMARA that has acted as a supplement to the environmental review of the Federally-Approved Project already conducted and concluded by the BLM pursuant to NEPA. There have been over thirteen

months of public review and comment on the Project, and nineteen County public hearing sessions on the Project. The County's environmental review has spanned a decade, including an EIR process that generated a 2000+ page, eight-volume proposed Final EIR, no less than two public circulations for comment of different iterations of the EIR, substantial delay, and extraordinary costs for CEMEX, all in addition to the United States' approved Final EIS issued in June 2000.

CEMEX and the United States assert that this review process by the County, including the extensive public review and numerous public hearings, already far exceeds what is reasonable environmental regulation in the context of the Federally-Approved Project. CEMEX and the United States assert, and the Court agrees, that the review process conducted by the County to date, which includes three County government denials of CEMEX's SMARA permit application,[6] amounts to unreasonable state environmental regulation of a federal project that is preempted by federal law. At a minimum, all Parties, including the County, acknowledge that further environmental review by the County, above and beyond that already conducted, would exceed reasonable environmental regulation and thus would be preempted. Accordingly, the Court finds that further County environmental process, including substitution of the EIR Traffic Methodology with a wholly different New DPW Methodology, and further public recirculation of the proposed

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[6] The three denials occurred on the following dates: (1) in December 1999, the Regional Planning Commission voted its intent to deny the Project, and adopted findings in support of denial in February 2000; (2) on April 24, 2001, the Board voted its "'intent to deny' (not approve)" the Project; and (3) on February 26, 2002, the Board voted its intent to deny the Project, and adopted findings in support of denial on April 23, 2002.

Final EIR, would "thwart the federal determination" and is preempted. *See Sayles Hydro Associates, supra*, 985 F.2d 452 (9th Cir.).

Notwithstanding this finding of preemption, CEMEX and the Untied States agree that the County may complete the CEQA EIR process under the conditions and limitations set forth below. The Parties acknowledge that CEQA generally requires a lead agency to balance the economic, legal, social, technological, or other benefits of a project against its unavoidable environmental risks when determining whether to approve the project, and if such benefits outweigh the adverse environmental effects, then adverse environmental effects may be considered acceptable and the agency may adopt a Statement of Overriding Considerations. (Public Resources Code § 21081, subd. (b); California Code of Regulations, Title 14, §§ 15021, subd. (d), 15093, subd. (a)).

CEMEX and the Untied States assert that a Statement of Overriding Considerations is only relevant where a lead agency exercises discretionary authority to approve or deny a proposed project. CEMEX and the United States assert that no Statement of Overriding Considerations is required of the County because it lacks discretion to approve or deny the Project, and only acts in accordance with Federal-state comity principles to impose reasonable environmental regulations, beyond which all County regulation of the Project is preempted by federal law.

**B. Adequacy Of Environmental Review**

CEQA requires that local agencies such as the County prepare environmental documentation evaluating potential environmental impacts of projects and identify feasible measures to mitigate such impacts. (Public Resources Code

§§ 21002, 21100).

CEQA requires that local agencies circulate a Draft EIR for public comment, and that the local agency prepare responses to the comments prior to the EIR being certified as adequate under CEQA. (Public Resources Code § 21091).

The County has prepared an EIR that identifies potential environmental impacts of the Project, and identifies numerous measures to mitigate potential environmental impacts. The County has prepared a Draft EIR and has circulated the Draft EIR for public review and comment. The County has prepared responses to the public comments on the Draft EIR. The County has also prepared an AEIDEIR with additional information to supplement the Draft EIR, and has also circulated the AEIDEIR for public review and comment. The County has prepared responses to the public comments to the AEIDEIR.

A local agency such as the County must complete the EIR process within one year of the time the agency accepts the project application as compete, subject to certain exceptions. Cal. Pub. Res. Code § 21151.5; *Sunset Drive Corp. v. City of Redlands*, 73 Cal.App. 4th 215 (1999). An agency that has missed this deadline may be compelled to act by writ of mandate. *Sunset Drive*, 73 Cal.App. 4th at 223. This includes compelling the County to complete the EIR process. *See id.*, at 222. CEMEX submitted its application for a surface mining permit to the County in 1991. As alleged by CEMEX in its Complaint, and without conceding the applicability of CEQA to the Federally-Approved Project, under the *Sunset Drive* case, the Parties agree that the County has exceeded the one-year limit, and is compelled to complete the CEQA process by certifying the Final EIR absent any further review or recirculation.

Notwithstanding that the one year time limit under CEQA has been exceeded, the environmental review by the County, and in particular as it relates to traffic impacts, is adequate under CEQA. In November 2001, the Planning Staff prepared a Staff Report recommending that the proposed Final EIR, which was made available for public review prior to the November 27, 2001 public hearing on the Project, was legally adequate under, and was suitable for certification pursuant to, the requirements of CEQA.

At the November 27, 2001 public hearing, the County DPW testifies that the November 2001 proposed Final EIR was inadequate due to the traffic impact analysis contained therein. Based on this testimony, the Board continued the hearing on the Project. As alleged in its Complaint, CEMEX asserts that this testimony was both pretextual and politically driven and that there were no inadequacies with the EIR Traffic Methodology in the November 2001 proposed Final EIR, and the proposed Final EIR was and remains legally adequate for certification under CEQA.

Thereafter, in February 2002, DPW issued a "provisional" traffic report using the New DPW Methodology rather than the EIR Traffic Methodology, and based upon the New DPW Methodology, concluded that there were potentially significant traffic impacts from the Project not previously identified in the November 2001 proposed Final EIR, which would require that the proposed Final EIR be recirculated again for additional public comment under CEQA.

On February 25, 2002, CEMEX submitted a substantial amount of documentation establishing the validity of the EIR Traffic Methodology. Included in the information provided by CEMEX was documentation of the chronology of written communications between CEMEX and DPW from October

1997 through February 1999 discussing the EIR Traffic Methodology, dated October 30, 1997, November 13, 1997, December 31, 1997, February 4, 1998, February 24 1998, March 24, 1998, May 7, 1998, August 5, 1998, August 26, 1998, October 14, 1998 and February 2, 1999. CEMEX's February 25, 2002 letter further detailed that the EIR Traffic Methodology in the proposed Final EIR is more reflective of the actual "real world" conditions on the relevant roadway (Soledad Canyon Road) than the New DPW Methodology asserted by the County.

The next morning on February 26, 2002, notwithstanding this documentation submitted by CEMEX, the Board voted its intent to deny the Federally-Approved Project in part due to the dispute over the alleged adequacy of the EIR Traffic Methodology. On April 23, 2002, the Board adopted findings in support of project denial, including adoption of numerous findings regarding the inadequacy of the EIR Traffic Methodology.

Having had the opportunity to further review the February 25, 2002 documentation submitted by CEMEX, the written correspondence between DPW and CEMEX, and other historical documentation compiled during the County's preparation of the administrative record in this case, as well as the allegations and claims made by CEMEX and the United States in this case, the County hereby reconsiders its prior findings and determinations regarding the adequacy of the EIR Traffic Methodology, and concludes that the EIR Traffic Methodology is valid. The County further concludes that the New DPW Methodology is also valid but that the New DPW Methodology is more conservative than the EIR Traffic Methodology, and is not necessary in light of the adequacy of the EIR Traffic Methodology.

Having made such a determination, the County further determines that the traffic analysis in the November 2001 proposed Final EIR, including the identification of mitigations in the proposed Final EIR, are adequate, and therefore the proposed Final EIR does not require further recirculation for public comment under CEQA.

In light of the foregoing, and notwithstanding the contention of CEMEX and the United States that federal preemption limits the applicability of the State and local environmental regulations to the Federally-Approved Project, the County acknowledges that, based upon its environmental review of the Federally-Approved Project, including the years of public comment and input, as well as the preparation of the environmental documents, findings and entitlements incorporated into this Consent Decree, the environmental impacts of the Federally-Approved Project have been adequately analyzed pursuant to the requirements of CEQA and local regulations.

Having reconsidered the adequacy of the EIR Traffic Methodology and the November 2001 proposed Final EIR, the County has further reconsidered the bases for denial of the Federally-Approved Project and hereby rescinds (and will take any further action required to formally accomplish this rescission) the following County actions that followed and flowed from the now revoked determination of inadequacy of traffic analysis:

a. the February 26, 2002 vote of intent to deny the Federally-Approved Project;

b. the April 23, 2002 findings and order supporting Federally-Approved Project denial.

## C. Public Hearing Process

CEQA does not require hearings. *See* 14 C.C. R. § 15087, subd. (i) (no public hearing required for Draft EIR); 14 C.C.R. § 15089 (no requirement for review of Final EIR). The parties thus agree that the County is not required to hold public hearings pursuant to CEQA.

The Surface Mining and Reclamation Act ("SMARA"), only requires one public hearing: "[ever]y lead agency shall adopt ordinances in accordance with state policy which establish procedures for the review and approval of reclamation plans . . . [t]he ordinances shall establish procedures requiring at least one public hearing . . ." Pub. Res. Code § 2774(a). The County has already had approximately nineteen continued public hearing sessions on the Project, both before the Regional Planning Commission, and before the Board, including at least ten public hearing sessions with public comment and/or testimony, giving the County ample opportunity to hear the public's concerns with, comments on, and opposition/support for, the Project.

CEMEX and the United States contend that due process principles do not require public hearings in this case because the land use authorization for the Federally-Approved Project has already been conferred and determined by the United States through the BLM in the ROD approving the Project. Moreover, to the extent due process principles arguably require public hearings, CEMEX and the United States contend that further state and local procedural requirements may be foregone in the context of consent decrees where such procedural requirements have been identified as sources of impermissible conflict with federal law and decisions.

The Parties stipulate and the Court finds that, to the extent that any process is due, the considerable process already conducted before the County satisfies any such requirements. There have already been approximately nineteen continued public hearing sessions before the County (over and above the hearings before the BLM) for the Project, and for at least ten such public hearing sessions, members of the public were able to express any concerns and provide whatever information they wished to the County. Thus, there has been ample opportunity for public participation under any applicable statues.

NOW, THEREFORE, SUBJECT TO FINAL APPROVAL OF THE COURT, THE PARTIES AGREE AS FOLLOWS:

## V. PARAMETERS OF PROJECT TO BE APPROVED BY THE COUNTY

### A. Federal Land Use and Environmental Decision-Making

The BLM has engaged in a series of land use decisions which frame the scope of the Federally-Approved Project implementing the provisions and objectives of federal law relating to mining and the use of the public lands, as specifically set forth in the Materials Act and FLPMA, and in implementing regulations. These various federal decisions, as well as related federal decision-making (most notably by the U.S. Fish and Wildlife Service) establish the framework for the Project which cannot be interfered with or otherwise frustrated by County review and requirements. In accordance with this principle, the Parties incorporate herein by reference the following decisions and documents issued during the federal land use and environmental review of the Project:

- 1989 Environmental Assessment for the Notice of Sand and Gravel Sales;

- Federal Contracts for the Sales of Units of Materials, Contract Numbers CA-20139 and CA-22901 (attached as **Exhibit A** hereto)

- 1998 Biological Opinion (incorporated herein);

- August 1, 2000 Record of Decision (also attached as **Exhibit B** hereto);

- June 2000 Final EIS, and all technical documents referenced therein (incorporated herein);

- 2001 Biological Opinion (incorporated herein);

- January 8, 2002 Interior Board of Land Appeals Order Affirming ROD (attached as **Exhibit C**).

These documents establish the parameters of the Federally-Approved Project, and the terms, conditions, analyses, requirements and conclusions contained in these documents control over any unlawfully conflicting or inconsistent State or local provisions or requirements. In the event that either of the aforementioned Biological Opinions becomes the subject of a successful court challenge, and, as a consequence, either Biological Opinion is invalidated, the validity of this Consent Decree shall not be affected, despite the fact that the mining activity contemplated by the Federally-Approved Project may be suspended temporarily pending reinitiation of consultation with the U.S. Fish and Wildlife Service by the BLM, and the receipt of a successor Biological Opinion.

## B. CEQA Environmental Documentation and Review

### 1. The County Will Certify the November 2001 EIR Without Further Public Review or Comment

As determined herein, the County acknowledges that the EIR Traffic Methodology employed in the November 2001 proposed Final EIR is adequate under CEQA for analysis of the County-Approved Project's traffic impacts, irrespective of whether the methodology set forth in the County's February 2002 provisional traffic study New DPW Methodology might also be valid, and the County expressly revokes any statements or other representations to the contrary.

The County also agrees that the traffic mitigations in the November 2001 proposed Final EIR are adequate under CEQA and mitigate impacts to less than significant levels under CEQA; and, the County expressly revokes any statements or other representations to the contrary.

Because the Parties agree herein that the EIR Traffic Methodology as set forth in the November 2001 proposed Final EIR is adequate pursuant to CEQA and the County's own traffic guidelines, there is no "new" information relating to the County-Approved Project that warrants further environmental review or analysis by the County. Under CEQA, further public notice and review for additional comments, also known as "recirculation", is directed where a lead agency adds "significant new information" to an EIR. Cal. Pub. Resources Code, § 21092.1. The Parties hereby agree that no significant new information has been added to the November 2001 proposed Final EIR or otherwise identified and thus no further public review or commenting is

required. The Parties hereby further stipulate that, without conceding the applicability of CEQA to the Project, the County has met all hearing requirements of CEQA, as CEQA has no public hearing requirement. *See* California Code of Regulations, Title 14, §§ 15087, subd.(i) and 15089.

Additionally, the Parties further agree that even if there were significant new information added to the November 2001 proposed Final EIR, that further environmental review and delays would be precluded under federal preemption, as well as under the requirements of CEQA. The Parties agree, and the Court finds, that further public review and recirculation of the EIR would conflict with and frustrate the implementation of the Project, which has already been significantly delayed, and would thus be preempted by the federal laws relating to mining and the federal decisions in place implementing those laws (discussed above), and the County expressly revokes any statements to the contrary.

The Parties agree that recirculation is not substantively required, and also, recirculation is precluded by the timing provisions of CEQA, including Public Resources Code § 21151.5 and the *Sunset Drive* case. The County expressly revokes any previous statement to the contrary.

Based on the County's express acknowledgement herein of the adequacy of the existing EIR Traffic Methodology in the November 2001 proposed Final EIR, the preemptive effect of federal laws and decisions over protracted and unwarranted County process, and CEQA's own requirements for certification, the Parties agree that the County will certify a Final EIR for the County-Approved Project (defined herein), consisting of the November 2001 proposed Final EIR, including incorporation of the mitigation measures identified in the January 2004 Proposed MMRP. These mitigation

measures are detailed in **Exhibit D** attached hereto and incorporated into the terms of this Consent Decree. Although not required by CEQA, additional Project Conditions addressing traffic impacts are further detailed in **Exhibit H** attached hereto and incorporated into the terms of the Consent Decree.

The County will certify the Final EIR within sixty (60) days of entry of this Consent Decree by the Court as a regular agenda item during a regularly scheduled meeting of the Board.

**2. The County Will Prepare and Adopt CEQA Findings**

As part of the completion of the CEQA process, the Parties agree that the County will complete and issue Findings, in the form attached hereto as **Exhibit E** under CEQA ("CEQA Finding"), detailing the County's environmental determinations relating to the County-Approved Project.

The CEQA Findings will discuss the County's extensive environmental review of the Federally-Approved Project which spanned ten years, the over thirteen months of public review, and the approximately nineteen continued public hearing sessions, including at least ten public hearing sessions with public comment and/or testimony. The CEQA Findings will discuss how the County has complied with the requirements of CEQA and SMARA through this process, and how it has identified a range of reasonable environmental conditions for the Federally-Approval Project in accordance with the Federal approvals.

In accordance with this acknowledgment, the CEQA Findings will detail that the traffic methodology utilized in the

November 2001 proposed Final EIR is adequate for the County-Approved Project. The CEQA Findings will include a traffic discussion that would: (i) clarify that the methodology in the November 2001 proposed Final EIR traffic analysis is valid, irrespective of whether the methodology set forth in the County's February 2002 provisional traffic study might also be valid, and that although the February 2002 methodology is more conservative, it is not necessary given the adequacy of the EIR Traffic methodology; and (ii) the mitigations in the November 2001 proposed Final EIR are adequate under CEQA, and further that additional Project Conditions imposed on the Project as a compromise of litigation through the Consent Decree process further address Project impacts.

The CEQA Findings will include a discussion regarding the arroyo toad, addressing: (i) why there is no significant impact to the arroyo toad; (ii) the additional measures included in the Project pursuant to the 2001 Biological Opinion; (iii) that no additional information regarding the arroyo toad, other than what was in the November 2001 EIR is required for the Project; and (iv) County Planning Staff's conclusion in the November 2001 Staff Report that recirculation of the EIR was not required based on the discovery of arroyo toad tadpoles in the Santa Clara River in May 2002. CEQA Findings in the form attached hereto as **Exhibit E** will be adopted as a regular agenda item at the same time the Board certifies the Final EIR.

### 3. The County Will Prepare and Adopt a Statement of Overriding Considerations

The United States asserts that the federal project is not governed by CEQA. CEMEX and the United States assert that there is no legal requirement for the County to prepare a

Statement of Overriding Considerations ("SOC) for the County-Approved Project because an SOC is a land use decision-making document, and is thus not applicable where the County exercises no land use decision-making powers. Notwithstanding the issue of whether an SOC is required for the County-Approved Project, in the interests of settlement, the Parties agree that an SOC would be adopted, in the form attached hereto as **Exhibit F**, consistent with principles of federal preemption, the federal laws applicable to the Project and BLM decisions issued pursuant to those laws, the recitals, stipulations, findings, and determinations contained within this Consent Decree, as well as the Court's injunction issued herein. Neither CEMEX nor the United States waives any rights to assert that the SOC is gratuitous and of no legal effect in the event of a subsequent legal challenge by a third party.

The SOC shall detail the preemptive effect of federal law relating to mining, including but not limited to the Materials Act, FLPMA, and regulations implementing those statutes, as well as the preemptive effect of the various decisions made by the BLM relating to the sale of mineral materials at the Project Site, as well as the various determinations relating to CEMEX's Project, including the ultimate decision to approve the Federally-Approved Project in the August 2000 ROD, as upheld in the IBLA's January 8, 2002 decision. The SOC would identify these federal laws and decisions as overriding legal considerations supporting the County's approval of the County-Approved Project.

The SOC will discuss the series of BLM and related federal decisions relating to mining of the Project Site as set forth and discussed above in this Consent Decree, culminating in the August 2000 ROD, and detail how these decisions have a preemptive effect on the County's ability to deny the

Federally-Approved Project.

The SOC will further discuss the series of BLM decisions and indicate that these decisions preempt the County from engaging in excessive delays in approving the Federally-Approved Project, and from imposing on the Federally-Approved Project conditions or other requirements that would conflict with, or frustrate implementation of the Federally-Approved Project.

The SOC will discuss the environmental analysis conducted by the BLM pursuant to NEPA, as well as the host of mitigation measures and other requirements imposed on the Federally-Approved Project by the BLM to minimize environmental impacts, and discuss how, in the context of federal preemption, the County is limited to supplementing these mitigation measures and requirements with reasonable environmental conditions. The SOC in the form attached hereto as **Exhibit F** will be adopted as a regular agenda item at the same time the Board certifies the Final EIR.

**C. The County Will Issue All Required Entitlements For The County-Approved Project**

In addition to completing its environmental review of the County-Approved Project under CEQA, the County will issue all relevant entitlements and permits for the County-Approved Project.

The Parties agree that there are no further public hearing requirements relating to any of the entitlements or permits to be approved for the County-Approved Project by the County. SMARA only requires one public hearing. Cal. Pub. Resources Code § 2774(a). The Parties stipulate that no

further SMARA or other entitlement hearings are required for the County-Approved Project. The following entitlement documents, in the forms attached hereto, will be approved for the County-Approved Project as a regular agenda item on the Board's agenda within sixty (60) days of the Court's entry of this Consent Decree.

### 1. Surface Mining Permit and Project Findings

The County will issue Findings and Order, in the form attached hereto as **Exhibit G**, detailing the County's determinations of compliance with County requirements relating to the County-Approved Project ("Project Findings"), which combined with Project Conditions, as referenced herein, shall comprise the Surface Mining Permit for the County-Approved Project. The County-Approved Project shall consist of the following:

- The Federally-Approved Project as analyzed by the BLM in the Final EIS published in June 2000, and as approved by the BLM in the August 2000 ROD;

- The environmental mitigation measures identified in the County's January 2004 Proposed MMRP; and

- The Project Conditions as negotiated between the parties and approved by the Board on April 22, 2003. Attached hereto as **Exhibit H** are the Project Conditions agreed to by the parties during the course of the settlement negotiations. These Project Conditions represent additional Project requirements above and beyond the environmental

mitigation measures for the County-Approved Project included as part of the County's review pursuant to CEQA, and have been agreed to by CEMEX and the United States in an effort to avoid expenses and undue delay on implementation of the Federally-Approved Project.

**2. Reclamation Plan**

The County will approve a Reclamation Plan for the County-Approved Project as required by SMARA and the County of Los Angeles Code, in the form attached hereto as **Exhibit 1**,[7] and shall consist of the following documents already on file with and previously reviewed by the County:

- PROJECT DESCRIPTION
  Revised Final Environmental Impact Report, Volume 1 – Responses to Comments, Soledad Canyon Sand and Gravel Mining Project, November 2001, Selected text, pages 2-81 through 2-110;

- REVEGETATION SPECIFICATIONS
  Additional Environmental Information to the Environmental Impact Report ("AEIDEIR"), August 2000, Soledad Canyon Sand and Gravel Mining Project, August 2000, Selected text: pages 2-28 to 2-39;

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[7] The attached October 29, 2003 proposed Mining and Reclamation Plan is prepared pursuant to both Federal and SMARA reclamation requirements. For purposes of County compliance with SMARA, this document is considered a "reclamation plan" only and is referred to here and elsewhere as the proposed Reclamation Plan.

- ADDENDUM TO THE MINING AND RECLAMATION PLAN
  Soledad Canyon Sand and Gravel Mining Project, June 2000, Attachment 1: Slope Stability Evaluation, Hilltop Geotechnical, Inc., June 28, 1998;

- MINING AND RECLAMATION PLAN
  Transit Mixed Concrete Company, Soledad Canyon Sand and Gravel Mining Project, June 1997, Selected text: pages 1 through 61, Appendix G: Performance and Reclamation Bond, Appendix H: LACO Mining and Reclamation Plan Review Comments, and Selected Figures;

- MITIGATION MONITORING AND REPORTING PROGRAM
  Revised Final Environmental Impact Report, Soledad Canyon Sand and Gravel Mining project, January 2004;

- CONDITIONS
  CEMEX Soledad Canyon Project Conditions;

- SUPPORTING STUDIES FOR MITIGATED MINING CUTS MITIGATION
  Final Environmental Impact Report, Volume 6, Technical Appendices, Appendix L, April 2001, Slope Stability Review, Hilltop Geotechnical, Inc., March 23, 2001; Addendum to the Drainage Concept, West Coast Environmental and Engineering, March 23, 2001; and

- FINAL RECLAMATION PLAN FIGURE, EXHIBIT A
  Daniel J. Pellow Consulting, October 16, 2003.

### *3. Financial Assurances*

The County will approve financial assurances for the County-Approved Project consistent with the Reclamation Plan, and the draft Financial Assurances Cost Estimate, in the form attached hereto as **Exhibit J**.

## VI. INJUNCTIVE RELIEF

IN ACCORDANCE WITH THE ABOVE PROVISIONS, THE FOLLOWING INJUNCTIVE RELIEF IS HEREBY ISSUED:

The County is enjoined from taking any actions conflicting with the provisions set forth in this Consent Decree, and is enjoined to comply with all provisions, terms, requirements, and obligations set forth in this Consent Decree. The County is further enjoined from further delaying, frustrating or otherwise interfering with the implementation of the Federally-Approved Project, including through delays in approving the County-Approved Project.

The County is ordered to complete the environmental review process pursuant to the provisions of CEQA and as mandated in this Consent Decree, including certification of a Final EIR for the County-Approved Project in the form of the November 2001 proposed Final EIR, adoption of the Mitigation Monitoring and Reporting Program, in the forms attached hereto as **Exhibits D**, and issuance of CEQA Findings and an SOC, in the forms attached hereto as **Exhibits E and F**, within sixty (60) days from the date of entry of this Consent Decree. County is enjoined from conducting further environmental review for the County-Approved Project prior to issuance of its approval.

The County is ordered to issue Project Findings, a Surface Mining Permit, and Reclamation Plan in the forms attached hereto as **Exhibits G, H, and J** and incorporating the terms of **Exhibit H**, and Financial Assurances Cost Estimate in the Form attached hereto as **Exhibit J** to CEMEX, utilizing the process mandated by this Consent Decree, within sixty (60) days from the date of entry of this Consent Decree.

County is enjoined from taking any actions that interfere with, conflict with, or otherwise frustrate or impair the terms of this Consent Decree, and will take no action to contradict the findings or determinations herein. The County is further enjoined from taking any actions which seek to impair the implementation of this Consent Decree, or that interfere with CEMEX's or the United States' interests relating to the County-Approved Project or the Project Site.

The County is enjoined from taking any actions which affect the rights or interests of CEMEX or the United States relating to the County-Approved Project or Project Site, before any other body, agency or official.

THE PARTIES HEREBY CONSENT AND SEEK ENTRY OF THIS CONSENT DECREE AS AN ORDER OF THIS COURT

**APPROVED AS TO FORM**

DATED: 02-19-04

FOR PLAINTIFF
CEMEX, INC.:

JEFFER, MANGELS,
BUTLER & MARMARO LLP

By: /s/ Kerry Shapiro
Kerry Shapiro
Attorneys for Plaintiff
CEMEX, Inc., a
Louisiana corporation

DATED: FEB 03 2004

CEMEX, INC.

By: /s/ Leslie A. White

Its: _____

COUNTY OF LOS ANGELES

By: /s/ Don Knabe
Chairman, Board of
Supervisors

ATTEST:
VIOLET VARONA-LUKENS
Executive Officer/Clerk of the
Board of Supervisors

By: /s/ Angie maS [Montes]
Deputy

APPROVED AS TO FORM
BY COUNTY COUNSEL

LLOYD W. PELLMAN

By: /s/ Richard D. Weiss
Deputy

APPROVED AS TO FORM
BY FOX & SOHAGI

By: /s/ Deborah J. Fox 2/4/04
Deborah J. Fox

**ADOPTED**

BOARD OF SUPERVISORS
COUNTY OF LOS ANGELES
FEB 03 2004
/s/ Violet Varona-Lukens
Violet Varona-Lukens
Executive Officer

I hereby certify that pursuant to Section 25103 of the Government Code, delivery of this document has been made.

Violet Varona-Lukens
Executive Officer
Clerk of the Board of Supervisors

By: /s/ Angie maS [Montes]
Deputy

DATED: 02-11-2004

FOR UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

By: /s/ Edward S. Geldermann

UNITED STATES OF AMERICA

By: _____

Its: _____

IT IS SO ORDERED:

DATED: May 3, 2004

DICKRAN TEVRIZIAN
JUDGE OF THE UNITED STATES DISTRICT COURT

**[EXHIBITS A THROUGH J ARE NOT INCLUDED WITH THE CONSENT DECREE]**

C-85

# UNITED STATES DISTRICT COURT
# CENTRAL DISTRICT OF CALIFORNIA

**ENTERED**
CLERK, U.S. DISTRICT COURT
**MAY- 5 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

**FILED**
CLERK, U.S. DISTRICT COURT
**MAY - 3 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

| | |
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| Priority | √ |
| Send | √ |
| Enter | √ |
| Closed | |
| JS-5/JS-6 | √ |
| JS-2/JS-3 | |
| Scan Only | |

CEMEX, INC., a Louisiana Corporation,
Plaintiff,

vs.

COUNTY OF LOS ANGELES, and DOES 1 through 10, Inclusive,
Defendants.

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UNITED STATES OF AMERICA,
Plaintiff-in-Intervention.

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CITY OF SANTA CLARITA,
Defendant-in-Intervention.

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CASE NO. CV-02-747 DT (FMOx)

ORDER **GRANTING** CEMEX'S REQUEST FOR JUDICIAL NOTICE AND **GRANTING** MOTION FOR ENTRY OF CONSENT DECREE

## I. Background

### A. Factual Summary

Plaintiff CEMEX, Inc. ("Plaintiff" or "CEMEX") brings this action against the County of Los Angeles ("County") for declaratory and injunctive relief, writ of mandate, and damages related to the implementation of a federally funded mining project located in the Soledad Canyon area of Los Angeles County. Plaintiff asserts the following claims for relief in its Second Amended Complaint ("SAC"): (1) Declaratory and Injunctive Relief – Federal Preemption; (2) Declaratory Relief – Federal Preemption; (3) Violation of Procedural Due Process; (4) Violation of Substantive Due Process; (5) Violation of the Equal Protection Clause; (6) Writ of Mandate; (7) Damages – Violation of the Taking Clause; (8) Just Compensation – Inverse Condemnation; (9) Writ of Administrative Mandamus.

The "Stipulated Factual Background," as contained in the Consent Decree, is the basis of the Consent Decree and is adopted by this Court and incorporated by reference herein as the Factual Summary of this Case and this Order.[1] (*See*

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[1] The Stipulated Factual Background contains the "Project Overview," the "Federal Environmental Review of the Project," the "County Environmental Review of the Project," and the "Pleadings and the Parties Allegations."

Decree, p. 25-43.)

**B. Procedural Summary**

On January 25, 2002, Plaintiff filed a Complaint for Declaratory and Injunctive Relieve, Writ of Mandate, and Damages.

On January 25, 2002, Plaintiff also filed a Notice of Related Cases re: (1) *United States of America v. Canyon County Enterprises, Inc.* (dba Curtis Sand and Gravel, et al.), Case No. CV 86-535 DT (JRx), and (2) *United States of America v. Canyon County Enterprises, Inc.*, et al., Case No. CV-97-0168 DT (ANx).

On February 25, 2002, the City filed a Motion to Intervene.

On February 25, 2002, this Court (Snyder) filed an Order for Ex Parte Application to Shorten Time for hearing on the City's Motion to Intervene, which was thereby set for March 25, 2002, at 10:00 a.m.

On March 1, 2002, the Matter was Transferred to this Court (Tevrizian) pursuant to General Order 224 as a Related Case.

On March 25, 2002, this Court filed an Order denying City of Santa Clarita's Motion to Intervene, which was thereafter entered on March 26, 2002.

On March 28, 2002, Plaintiff filed a Notice of Entry of Order Denying City of Santa Clarita's Motion to Intervene.

On April 12, 2002, Plaintiff filed a First Amended

Complaint for Declaratory and Injunctive Relief, Writ of Mandate and Damages.

On May 10, 2002, Plaintiff filed a Request for Preparation of Administrative Record.

On May 10, 2002, Plaintiff filed a Second Amended Complaint for Declaratory and Injunctive Relief, Writ of Mandate and Damages.

On May 28, 2002, the City filed a Renewed Motion to Intervene as a Defendant under Rule 24.

On June 3, 2002, the parties filed a Joint Report re Discovery and Other Matters pursuant to Fed.R.Civ.P. 26(f) and Local Rule 26.

On June 17, 2002, Defendant County of Los Angeles filed a Notice of Motion and Motion to Dismiss the Second Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted, or in the alternative, Motion to Abstain from the Exercise of Jurisdiction, which this Court granted in part and denied in part of July 29, 2002.

On July 2, 2002, County of Los Angeles filed a Notice of CEQA Settlement Meeting pursuant to California Public resources Code § 21167.8.

On July 8, 2002, the United States, filed an Ex Parte Application of Edward S. Geldermann, as Attorney for the United States, to be Relieved From Local Rule 83.2-3 Requiring Permission to Appear Pro Hac Vice, which was denied on July 10, 2002.

On July 8, 2002, the United States filed an Ex Parte

Application to Excuse Compliance with Local Rule 7-3 and 6-1, 7-9, and 7-10, for leave to file Motion to Intervene, and to schedule a hearing on Motion to Intervene for July 22, 2002, which was denied without prejudice to the bringing of a properly noticed motion on July 10, 2002.

On July 8, 2002, this Court filed an Order Denying City of Santa Clarita's Renewed Motion to Intervene as a Defendant Under Rule 24, which was thereafter entered on July 10, 2002.

On August 5, 2002, the United States of America filed a Notice of Motion and Motion to Intervene as a Plaintiff, which was granted on September 9, 2002.

On August 5, 2002, the City of Santa Clarita filed a Notice of Appeal from an Order denying the City's Renewed Motion to Intervene entered on July 10, 2002.

On August 20, 2002, the County of the Los Angeles filed their Answer to Plaintiff's Second Amended Complaint.

On September 10, 2002, the United States of America filed a Complaint in Intervention for Declaratory and Injunctive Relief.

On October 9, 2002, the County of Los Angeles filed their Answer to United States of America's Complaint In Intervention.

On November 18, 2002, Plaintiff, the United States, and the County of Los Angeles filed a Joint Report Re Discovery Plan and Other Matters pursuant to Federal Rule of Civil Procedure 26(f) and Local Rule 26-1.

On November 25, 2002, this Court held a Scheduling Conference and set the following dates: Discovery Cutoff – August 29, 2003; Summary Judgment Motions – November 24, 2003 at 10:00 a.m. (Pretrial and Trial Settings). This Court further set a hearing on proposed discovery for December 16, 2002 at 10:00 a.m., and instructed the parties to submit separate lists of possible candidates to preside over mediation by December 9, 2002.

On December 3, 2002, the County of Los Angeles submitted its three suggested judges for alternative dispute resolution pursuant to this Court's November 25, 2002 Scheduling Conference instructions. On the same date, Plaintiff and the United States also submitted the names of three suggested judges for alternative dispute resolution.

On December 11, 2002, Plaintiff filed a Report to the Court Re Outstanding Issues Relating to Depositions and Documents, which included Plaintiff's and the United States of America's Preliminary List of Proposed Witnesses for Deposition.

On December 11, 2002, Defendant County of Los Angeles filed a Preliminary List of Potential Deponents. On this same date, County of Los Angeles also filed its Objection to Plaintiffs' Preliminary List of Eight (80) Potential Deponents.

On or about December 11, 2002, the Court selected retired federal judge Layn Phillips to conduct alternate dispute resolution pursuant to Local Rule 16.14 and ordered the parties to conduct 24 hours of mediation.

On December 13, 2002, Defendant County of Los Angeles filed a Response and Objection to Plaintiffs' Report to Court Re Outstanding Issues Relating to Depositions and

Documents.

On December 16, 2002, this Court held a hearing on proposed discovery and ordered the following: Plaintiffs 17 Depositions; Defendant – Statutory Amount of Depositions.

On January 10, 2003, Defendant County of Los Angeles filed a Request for Enlargement of Time to File Jury Trial Demand or, in the Alternative, Request for Relief from Failure to File Jury Trial Demand, which this Court denied on February 3, 2003.

On May 21, 2003, this Court set a Status Conference Re Progress of the Case on June 16, 2003 at 10:00 a.m.

On June 16, 2003, the Status Conference was held and the Court agreed that the EIR need not be recirculated.

On November 3, 2003, oral argument was held before the Ninth Circuit Court of Appeals.

On November 24, 2003, Plaintiff filed a Notice of Entry of Order Pursuant to the Stipulation of Parties Continuing (1) Status Conference from November 24, 2003, to February 23, 2004 at 10:00 a.m.; (2) Discovery Cut-Off from November 28, 2003, to March 31, 2004; (3) Pre-Trial Conference from February 23, 2004, to May 24, 2004 at 1:30 p.m.; (4) Summary Judgment Motions from February 2, 2004, at 10:00 a.m. to April 26, 2004 at 10:00 a.m.

On November 26, 2003, City of Santa Clarita filed a Notice of Motion and Motion for Stay of Proceedings Pending Appeal, which was denied by this Court on January 12, 2004.

On February 11, 2004, a Stipulation and Order filed

Continuing Status Conference until March 15, 2004.

On February 23, 2004, CEMEX filed a Motion for Entry of Consent Decree, which is currently before this Court. On this same date, Defendant County of Los Angeles filed a Joinder in Motion for Entry of Consent Decree. On this same date, Plaintiff-in-Intervenor United States also filed a Joinder in Motion for Entry of Consent Decree.

On February 23, 2004, the County of Los Angeles lodged Ninety-Three (93) Volumes of Administrative Record with this Court.

On February 25, 2004, CEMEX filed a Notice to Court of Ruling by the Ninth Circuit Regarding the Intervention of the City of Santa Clarita as it Pertains to the Motion for Entry of Consent Decree.

On February 26, 2004, an Order was filed granting Ex Parte Application to Continue Hearing Date for CEMEX's Motion for Entry of Consent Decree and Setting Briefing Schedule from March 15, 2004 to May 3, 2004.

On March 9, 2004, Defendant-in-Intervention City of Santa Clarita filed an Answer to Second Amended Complaint.

On March 12, 2004, a Stipulation was filed Continuing Status Conference.

On March 16, 2004, this Court filed an Order Pursuant to the Stipulation of Parties Continuing Status Conference Hearing Date from March 15, 2004 to May 3, 2004.

On March 19, 2004, this Court received the Memorandum Opinion issued by the Ninth Circuit Regarding the

Intervention of the City of Santa Clarita as it Pertains to the Motion for Entry of Consent Decree.

On April 5, 2004, Defendant-in-Intervenor City of Santa Clarita filed a Notice of Motion and Motion for Summary Judgment/Adjudication.

On April 5, 2004, Defendant-in-Intervenor City of Santa Clarita filed an Opposition to Motion for Entry of Consent Decree.

On April 6, 2004, CEMEX filed an Ex Parte Application to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgment. On this same date, Defendant Los Angeles County filed a Joinder in the Ex Parte Application of Plaintiff CEMEX for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgement.

On April 7, 2004, Defendant United States filed a Joinder in the Ex Parte Application of Plaintiff CEMEX for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgment.

On April 8, 2004, an Order was filed Granting Ex Parte Application of Plaintiff CEMEX for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgment.

On April 19, 2004, CEMEX, Plaintiff-in-Intervenor United States, and Defendant County of Los Angeles filed their Replies in Support of Motion for Entry of Consent Decree.

## II. Discussion

### A. Standards

#### 1. Request for Judicial Notice

A court must take judicial notice if a party requests it and supplies the court with the requisite information. Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). This Court may take judicial notice of facts outside the pleadings without converting the motion to one for summary judgment. *See Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986)(citing *Sears, Roebuck & Co. v. Metropolitan Engravers*, Ltd., 245 F.2d 67, 70 (9th Cir. 1956)).

A court may take judicial notice of "records and reports of administrative bodies." *Mack*, 798 F.2d at 1282 (citing *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953)). In addition, documents whose contents are alleged in a complaint and whose authenticity is not in question may be considered in a motion to dismiss. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994).

This Court may take judicial notice of its own records, and documents that are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters of public record outside the pleadings); *United States*

*v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) (courts may take judicial notice of their own records).

### 2. Motion for Entry of Consent Decree

In an attempt to raise the standard for review of a consent decree, the City of Santa Clarita (the "City") cites to *Durrett v. Housing Authority of the City of Providence*, 896 F.2d 600 (1st Cir. 1990). However, the City's heightened standard and interpretation of *Durrett*'s required factors are misplaced and inaccurate. As a general matter, "a district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy." *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990); *see also United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). Additionally, where a consent decree may affect the public interest, there is a heightened responsibility on the court to protect that interest, but "the court need not require that the decree by 'in the public's best interest' if it is otherwise reasonable." *Id.* at 581, (*citing SEC v. Randolph*, 736 F.2d 525, 529) (emphasis in original). Ultimately, in approving a consent decree, the "court need only be satisfied that the decree represents a 'reasonable factual and legal determination." *Id.* (*citing United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (per curiam)).

The Supreme Court has defined consent judgments (i.e. consent decrees as follows:

> Consent decree are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate issues involved in the case and thus

> save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

*United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

As specifically set forth in the Ninth Circuit Memorandum Opinion in *CEMEX, Inc. v. County of Los Angeles*, 9th Cir. No. 02-56364:

> We note that the District Court may move forward with a consent decree between CEMEX and the County. *See City of Los Angeles*, 288 F.3d at 405. In *City of Los Angeles*, we held that "although this appeal involves intervention decisions made at the outset of the case, our holding [reversing the denial of permissive intervention and intervention of right and remanding] does not require the district court to turn back the clock or rescind the consent decree." 288 F.3d at 404-5. As in the *City of Los Angeles*, "our holding does not require the district court to turn back

> the clock." 288 F.3d at 404. Rather, the City shall be allowed to intervene as of the date of this disposition, and to be treated as an intervenor party from that date forward. *Id.* Thus, the City shall be entitled to be heard concerning the court's approval of any consent decree proposed between the original parties, and to appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in this case.

**B. Analysis**

Plaintiff CEMEX, Plaintiff-in-Intervenor United States of America ("United States"), and Defendant County Los Angeles (collectively herein referred to as the "Original Parties") have agreed to settle the litigation *CEMEX, Inc., et. al. v. County of Los Angeles*, U.S.D.C. Case No. CV 02-747 DT (FMOx), in accordance with the terms and conditions of a Consent Decree. By this Motion, the Parties jointly seek this Court's approval of their settlement and the entry of the Consent Decree as a judgment by this Court.

The Consent Decree is the result of an intense and long nine-month vigorously debated court supervised mediation process before the Honorable Layn R. Phillips, retired U.S. District Court judge. The Original Parties have settled their disputes regarding the County's environmental review and permitting of CEMEX's Soledad Canyon Sand and Gravel Mining Project pursuant to CEQA, SMARA and the County Surface Mining Permit Ordinance (County Code § 22.56.1240 *et seq.*) as reflected in the sixty-one (61) page proposed Consent Decree. The Consent Decree also allows the United States to complete its mineral material sale and regulatory

approval process for the Project while accommodating local authority by the County in a manner that does not prejudice the federal mineral sales program, and allows CEMEX finally to move forward with its Project. It is this Court's duty to independently review and scrutinize, if necessary, the terms of the Consent Decree in making sure ample support exists in support for the entry of said Decree.

Defendant-in-Intervention City of Santa Clarita ("City") recently filed an Opposition to Motion for Entry of Consent Decree, which will also be addressed in this Order.

### 1. CEMEX's Request for Judicial Notice is Granted

CEMEX asks this Court to take judicial notice of the following documents which are attached to the Request of Judicial Notice in Connection with Motion for Entry of Consent Decree, filed February 23, 2004:

Exhibit 1: January 23, 1986 Complaint for Conversion, Trespass, Injunctive Relief and Damages entitled *United States of America v. Canyon County Enterprises, Inc.*, United States District Court, Central District of California No. CV 86-0535 PAR (JRx);

Exhibit 2: Stipulation for Compromise Settlement and Order Thereon in *United States of America v. Canyon County Enterprises, Inc.*, Central District of California Case No. CV 86-535 PAR (JRx) filed June 23, 1988;

Exhibit 3: Notice of Motion for Partial Stay Pending Appeal of Order Denying Vacation of

Dismissal and Enforcement of Settlement Agreement; Memorandum of Points and Authorities; and Declaration of Ben W. Curtis with exhibits dated December 27, 1989 in *United States of America v. Canyon County Enterprises, Inc.*, United States District Court for the Central District of California Case No. CV 86-0535 DT (JRx);

Exhibit 4: A true and correct copy of the Memorandum Opinion issued by the Ninth Circuit in *United States of America v. Canyon County Enterprises, Inc.*, 9th Cir. No. 90-55302;

Exhibit 5: Amended/Agreed to Statement of Uncontroverted Facts and Conclusions of Law in Support of Plaintiff in Intervention and Counterdefendant Transit Mixed Concrete Company's Judgment on Summary Judgment filed November 14, 1997 in *United States of America v. Canyon County Enterprises, Inc.*, Central District of California Case No. CV 97-0168 DT (ANx);

Exhibit 6: Judgment on Summary Judgment in *United States of America v. Canyon County Enterprises, Inc.*, United States District Court for the Central District of California Case No. CV 97-0168 DT (ANx);

Exhibit 7: Amended Order Granting in Part and Denying in Part Motion of Plaintiff-in-Intervention Transit Mixed Concrete for Summary Judgment and Permanent Injunction in *United States of America v. Canyon County*

*Enterprises, Inc.*, United States District Court for the Central District of California Case No. CV 97-0168 DT (ANx).

This Court hereby grants Judicial Notice of these documents as they are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, bear a direct relation to matters at issue in the present proceedings, and have not been opposed.

### 3. The Parties Freely Entered Into the Consent Decree

The City contends that one of the factors in approving a consent decree is that the decree must be fair, adequate and reasonable, and the parties must have validly consented to the terms of the decree. *See Durrett*, 896 F.2d at 604. A consent decree is a judgment; it contains elements of a contract and contract principles may be applied to consent decrees. *United States v. ITT Continental Bakery, Co.*, 420 U.S. 223, 236-37 & n.10 (1975). With that, the City astonishingly advances an argument that the County did not freely enter into the Consent Decree and that it has "contract[ed] away public rights under threat of personal embarrassment or other sanction." (Opp., at 45:13-15.) However, contrary to the unsubstantiated allegatiosn of the City, the Consent Decree did not arise as a result of "duress" and "coercion."

The City's allegations fail to address the extensive and contentious meditation process between the Original Parties and ignores the clear record before the Court, contending that "[f]ollowing the denial" of the Federally-Approved Project on April 23, 2002, "the County began secret negotiations with CEMEX and the Federal government to extricate itself from this litigation . . . ." (Opp. At 12:26-27.)

As the Parties are aware, it was during a status conference on December 16, 2002, almost a year into the case, that the Parties were ordered to participate in mediation before the Honorable Layn R. Phillips, retired United States District Court judge. This Court-mandated mediation process spanned nine months, involving all-day sessions on February 13, 2003, March 5, 2003, April 8, 2003, May 19, 2003, an all-weekend session on September 6 and 7, 2003, and October 9, 2003; numerous telephone conferences with Judge Phillips; and countless days of direct negotiation sessions between the Parties. (*See* Declaration of Layn R. Phillips, dated April 19, 2004 ("Phillips Decl.") ¶ 6; *see also* Declaration of Kerry Shapiro in Support of Motion for Entry of Consent Decree, "First Shapiro Decl.," ¶1.)

The Consent Decree was not entered into out of duress. Rather, the negotiations "were conducted in an adversarial, arm's length basis" involving "exchanges of numerous proposals and counter-proposals among counsel[.]" (Phillips Decl., ¶ 10.) As the Court-appointed mediator said himself: "[t]hroughout the course of the negotiations, it became clear to me that each of the parties firmly believed that it was giving up terms and making concessions that it otherwise felt it might be able to obtain through litigation, in the interest of reaching a settlement." (Phillips Decl., ¶ 9.) The City's arguments that the Consent Decree is the result of "closed door, secret negotiations" between CEMEX, the United States, and the County and that because it was denied intervenor status, it was "wrongfully excluded from these back-room negotiations" is completely groundless and unsubstantiated. (Opp., at 1:9-24.) The City does not realize that all mediation sessions are generally confidential, regardless of whether the participating parties are public entities or not. The City erroneously characterizes a Federal Court ordered mediation before a highly-respected neutral moderator as "back-room

negotiations." Nothing could be further from the truth or disparaging to the judicial process or damaging to alternative dispute resolution conducted by experienced well qualified counsel and a respected former federal judicial officer.

Furthermore, the City's argument that "duress conditions" in the proposed Consent Decree directed against the County render it unfit to "police" the project mitigation measures in violation of CEQA and NEPA is without merit. The City is concerned with a portion of the Consent Decree establishing that between April 2003 and October 2003, one or more persons employed by the County engaged in some allegedly wrongful conduct, which is defined in the Decree as "Retroactive Conduct." CEMEX and the Federal Government apparently learned of this Conduct through some undisclosed source, the confidentiality of which they seek to protect. (Decree, p. 15, n.2.) The City contends that although the specifics of this conduct is never detailed, it is apparent that CEMEX and the Federal Government have "something big on" the County and are lording it over the County to extract concessions on the Project.

The City argues that as part of the enforceability provision set forth in the Consent Decree and for a period of up to two years after start-up of the Project, CEMEX or the Federal Government may publish the Retroactive Conduct in a Motion to Dissolve the Decree or other Motion for Contempt for violation of the Consent Decree if they determine that the "Official Policy Makers" (as that term is defined herein)[2] of

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[2] "Official Policy Makers" includes those recognized and defined under the body of case law interpreting 42 U.S.C. § 1983, which the Parties agree include at a minimum the County Supervisors, the County Counsel, Department Heads, the Chief Administrative Officer, and (for purposes of this enforcement provision) Conal McNarnara, Millie Jones

the County "directly or indirectly, engages in or encourages a course of conduct intended to materially delay, frustrate or prevent the timely and successful implementation of the County Approved Project." (Decree, 14:4-6) (hereinafter referred to as the "Duress Provisions"). The City contends that the County's judgment and substantive role in its supervisory function will be impaired and its supervision hamstrung due to these Duress Provisions.

First, as CEMEX argues in its Reply, the City's argument concerning the "enforceability" provisions fails to account for the fact that the County's decision to enter into the Consent Decree is not a result of the enforceability provisions included therein, but rather as a result of the claims raised by CEMEX and the United States relating to federal preemption and other constitutional theories. The enforceability provisions, thus did not "coerce" the County into settling, but rather are merely a result of the Parties negotiations following the decision to settle the lawsuit. The Declaration of Layn R. Phillips, the Court-appointed mediator, lays to rest the unfounded attack that the County only settled because CEMEX and the Federal government had "something big on the County." (Opp. 35:22-23.)

Moreover, the concept of "retroactive conduct" appears to this Court to be nothing more than the creation of a time line beyond which the Parties agree to continue forward in good faith. The Official Policy Makers and non-Official Policy Makers are restricted by the Consent Decree in taking only those actions that would directly lead to violations of the County's obligations under the Consent Decree. It does not provide an independent basis for liability outside the scope of this case, but rather provides a mechanism to return to the

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and Bob Haueter for so long as they remain employed by the County.

litigation. Thus, contrary to the City's unsubstantiated allegations, County officials or employees will not be hamstrung by their inability to distinguish between actions which "directly or indirectly, engage [] in or encourage [] a course of conduct intended to materially delay, frustrate or prevent the timely and successful implementation" of the Project. (Decree, p. 14:4-6; Opp., pp. 36-37.) The Consent Decree specifically requires that the County provide guidance, in the form of "instructions to its Official Policy Makers and to its non-policy making agents and employees who are involved in any non-incidental aspect of the implementation or administration of the [Project] regarding its and their obligations" under the Consent Decree. (Decree, p. 16:3-6.) Further, the County must "republish and distribute such instructions on an annual basis to its Official Policy Makers and to those individuals that have a non-incidental role in the implementation of the [Project] during the period of time during which this Consent Decree is in effect and being implemented." (*Id.*, p. 16:9-13.) Through the instructions and consultation with County Counsel, officials and staff will be adequately guided on carrying out their discretionary functions within the parameters of the settlement of this litigation.

Also contrary to the City's duress assertion is the fact that CEMEX cannot interfere with the County's process by arbitrarily claiming that the County has violated its rights under the Consent Decree. Any party claiming that the Consent Decree has been violated must first tender the matter to the mediator, Judge Phillips, who then must file with this Court a non-binding recommendation whether there has been a breach of the Consent Decree. (Decree, p. 17:6-10.) Any party claiming a breach must also first participate in good faith efforts to resolve the matter prior to any judicial review. (Decree, pp. 17:22-18:24.) Thus, CEMEX will not be able to

unilaterally charge the County with a material breach. Ultimately, the County retains full authority to enforce all Project conditions and environmental mitigation measures and to take lawful action in response to any violation thereof.

### 4. The City's Federal Preemption Argument Does Not Warrant Denial of the Consent Decree

As a matter of law, federal laws and regulations, and federal decisions, have preemptive effect over state law and process when those processes unlawfully conflict with or frustrate the federal decisions. *See, e.g., United States v. Shimer*, 367 U.S. 374 (1961); *see also General Motors v. Abrams*, 897 F.2d 34 (2nd Cir. 1990); *see also General Motors v. Abrams*, 897 F.2d 34 (2nd Cir. 1990); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084-87 (9th Cir. 1979). State regulatory process may also be preempted by conflict with federal law. *N.E. Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001). For example, a protracted state process may impose such hardship, cost, frustration and uncertainty as to be "sufficient to thwart the federal determination . . . ." *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993).

It is the County's position that the Bureau of Land Management's ("BLM") mineral materials sale to CEMEX is subject to the authority of *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 575 (1987), and that the County is entitled to impose reasonable environmental and resource protective regulation on the Project pursuant to SMARA and CEQA. The United States and CEMEX contend that the County has no land-use authority over the Project, and do not concede that the preemption analysis of

*Granite Rock* applies to BLM mineral materials sales.[3] The United States and CEMEX enter into the Consent Decree without waiving the right to argue, in any subsequent litigation involving the Project (including the Consent Decree), alternative theories concerning whether the state has authority to regulate BLM's performance of the federal function in relation to BLM-administered lands (including federally owned mineral estates) under the Materials Act of 1947.

### a. The City's First Argument that this Court Does Not Have the Authority to Enter the Proposed Consent Decree is Misplaced

The City's main concern is that the Consent Decree does not allow for full CEQA compliance. Thus, perhaps in an effort to obscure the fact that the County review process does in fact comply with state law, the City contends that this Court does not have the authority to approve the Proposed Consent Decree absent an express finding that any application of CEQA to the Project is preempted. Accordingly, the City demands that all preemption claims be adjudicated in this settlement process.

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[3] The United States and CEMEX believe that there may be differences between the statutes and regulations applicable to the hardrock mining activities at issue in *Granite Rock*, and those governing the United States' proprietary mineral disposition regime involved here, that militate against uncritically applying *Granite Rock's* analysis as the sole basis for preemption in this case. For this reason, the parties, as part of their negotiated settlement, did not specify *Granite Rock* as the controlling legal standard, but simply agreed that the facts of this case, under any legal standard (including *Granite Rock*), would satisfy a finding of preemption at least with respect to any further regulation of the Project by the County, except as outlined in the Consent Decree.

First, given the Administrative Record before the Court and the long history of environmental analysis conducted on this Project, it is this Court's finding that the Consent Decree sets forth a Project that complies with all substantive requirements of CEQA, fully identifies significant environmental effects and feasible mitigations, and which, in fact, provides additional environmental and other benefits to the County as a whole and the City in particular.

Second, the City exaggerates this Court's duties in reviewing the Consent Decree and misstates the preemption issue before this Court. Although principles of Federal preemption underlie the complaints by CEMEX and the United States in this action, the issue in this case, as framed in the pleading, law and motion orders, and the Motion to Enter the Consent Decree is whether further environmental process beyond that already conducted by the County prior to this lawsuit is preempted. The Parties have agreed to stipulate, and this Court independently finds on the basis of the record before it, that only further County review is preempted, because the Consent Decree and its related documents satisfy the requirements of state law, including both CEQA and the California Surface Mining and Reclamation Act ("SMARA"), Pub. Res. Code §§ 2710 *et. seq.* Thus, the Consent Decree establishes the following: (1) the Parties agree the County environmental process to date satisfies state law (CEQA and SMARA); (2) the Parties agree to settle and thus not to resolve whether the County process to date was appropriate or whether it was inappropriate and preempted; and (3) the Parties agree that, whether or not the process to date complies with state law, and whether or not the process to date is preempted, in any event, given the length of County process to date, state law CEQA timing limitations, and other factors, that any future County administrative proceedings are preempted.

As the Parties are aware, this Court has already advised the Parties and hereby agrees with their stipulation based on a complete record before it that further environmental review of the Project by the County is preempted, because it would frustrate the grant of federal mining contracts to CEMEX. This is consistent with the various legal precedents on preemption in the mining field, including, to the extent applicable, *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).

Accordingly, the City is incorrect in their assertion that this Court does not have the authority to enter this Consent Decree.

### 5. The Proposed Consent Decree Does Not Violate State and Federal Environmental Laws

It is understood that a consent decree may not authorize parties to take action that would otherwise be unlawful. *See League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (citations omitted).[4] The City contends that is the case here, as the Consent Decree would allegedly allow the Parties to violate CEQA, NEPA, and Federal Materials Act, the Clean Air Act, the Clean Water Act, the ROD and Federal Contracts at issue in this litigation.

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[4] CEQA's obligations may exceed NEPA's. *City of South Pasadena v. Gold Schmidt*, 637 F.2d 677, 680 n.4 (9th Cir. 1981) (*citing San Francisco Ecology Center v. City and County of San Francisco*, 122 Cal.Rptr 100, 48 Cal.App.3d 584 (1975)). Where NEPA's requirements are procedural only, CEQA's are both procedural and substantive. *City of Carmel-By-The-Sea v. United States Department of Transportation*, 123 F.3d 1142, 1150 (9th Cir. 1997).

### a. The Proposed Consent Decree does not violate CEQA or NEPA

According to the City, the procedures employed by the County, as they are memorialized in the Proposed Decree, the Findings, the Mitigation Measures, the Conditions and the Statement of Overriding Consideration ("SOC"), in combination with the future steps outlined in the Decree, do not comply with CEQA and NEPA as a matter of law.

#### (1) The Consent Decree is not procedurally flawed

First, the City manufactures a claim that procedurally, the Consent Decree is fatally defective because the City was excluded and unable to intervene as a defendant until the 9th Circuit Court of Appeals reversed this Court's denial in February 2004 and allowed for the City to be consulted on this Project. The City now contends that had intervention been granted at the outset, the City would have been "at the table" during the mediation negotiations regarding the Project's size and scope. Instead, the City contends that the Parties negotiated the Project conditions with total disregard to the City's interests. The City has apparently prioritized three specific mitigation measures as essential to the Project: [1] use of imported water, [2] use of railhaul; [3] no reduction of the ridgeline, however, due to its exclusion from the negotiations, the City contends that none of these measures are contained in the now Proposed Consent Decree.

This Court is not persuaded with the City's argument that it was excluded from the process. The record is clear that the City has actively participated throughout the framing, analysis, and development of this Project. In fact, the County encouraged the City's participation as commenting party on

the Project. However, unsatisfied with its role as a commenting party, it appears now that the City has adopted a no-holds barred approach to do whatever is in the City's power to either stop the Project or continue with this never ending review process. This Court will not allow the City to usurp the County's CEQA process simply to stop or further delay the Project.

**(2) The Consent Decree is not substantively flawed and the City has failed in its attempts to redefine the proposed project as being significantly different**

Second, the City contends that substantively, the Proposed Decree allegedly contains several significant changes to the Project that have not been subject to CEQA and NEPA review. It is the City's position that when a federal agency "makes substantial changes in the proposed action that are relevant to environmental concerns" the agency is required to prepare a Supplemental Environmental Impact Statement (SEIS). 40 C.F.R. § 1502.9 (c)(1)(i). Similarly, the City argues that the County is charged with analyzing any new information that comes to light pursuant to CEQA by acting as an appropriate consenting agency and thereby satisfying the requirements of NEPA. *See, e.g., Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998). CEQA requires recirculation of an EIR which has not been certified only in certain limited situations. Pursuant to CEQA Guidelines § 15088.5, recirculation of an EIR is triggered whenever "significant new information" is added to the EIR prior to its certification. However, the significant new information must change the EIR "in a way that deprives the public of a meaningful opportunity to comment on a substantial adverse

environmental effect of the project or a feasible way to mitigate or avoid such an effect . . . that the project's proponents have declined to implement." CEQA Guidelines § 15088.5(a). The "significant new information" trigger for recirculation reaffirms the goal of meaningful public participation in the CEQA review process, but does not do so with the intent to promote endless rounds of revision and recirculation of EIRs. *Laurel Heights Improvement Association v. Regents of the University of California*, 6 Cal.4th 1112, 1132 (1993). "Recirculation was intended to be an exception, rather than the general rule." *Id.* The California Supreme Court has cautioned that "'[R]ules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement.'" *Id.*, *citing Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 576, 276 Cal.Rptr.2d 410 (1990).

In this regard, the City first urges the Court to find that provisions in the U.S. Fish and Wildlife Service's August 2001 Supplemental Biological Opinion ("SBO") for the Arroyo Toad that allegedly adds five wells to the Project "radically alters the assumptions upon which the federal government approved the Project." (Opp., p. 27:19-20.) Next, the City asserts that the Consent Decree adds a new "project acceleration" provision for the Project that purportedly changes the annual rates of production of sand and gravel that CEMEX is authorized to mine under BLM's contracts, thereby allegedly increasing the annual maximum permissible amount of tonnage authorized to be produced, and allegedly constituting a significant change in the Project requiring updated environmental analysis. (*Id.*, pp. 29-30.) The City also asserts that there is "new information" requiring supplemental analysis to be found in the South Coast Air Quality Management District's ("AQMD") adoption of a new

methodology for quantifying cancer risk. The City also contends that cancer risk from the air quality impacts of delivery trucks shipping CEMEX's production has not been the subject of prior environmental review under NEPA, and will be exacerbated by the so-called new project acceleration provision. (*Id.*, p. 31-34.) However, as this Court explains below, the City has failed in its attempt to demonstrate that the Project has significantly changed, or that there is significant new information regarding its environmental impacts that triggers re-analysis and recirculation of the FEIR or Final EIS. What the City claims as being "significant new information" is nothing more than a rehash of analysis and information already considered by the County. Thus, there is no need to disapprove the Consent Decree on CEQA or NEPA grounds.

**(i) The City's argument that the discovery of the Arroyo Toad and the issuance of the Supplemental Biological Opinion trigger any recirculation under CEQA or NEPA lacks merit**

As stated above, the City argues that the provision in the U.S. Fish and Wildlife Service's ("USFWS") Supplemental Biological Opinion ("SBO") for a Habitat Protection Plan ("HPP") allegedly adds five wells to the Project and changes the placement of wells, which, according to the City, radically alters the assumptions upon which the Project was approved. The City argues that the five new wells will significantly impact the Stickleback and Arroyo Toad, and thus, must be honestly and validly analyzed.

The City's arguments that the SBO, which is a document

prepared by the Federal agency with expertise in protecting endangered species and specifically prepared to address and minimize impacts to the Arroyo Toad, now creates significant impacts to the Arroyo Toad, is without merit and lacking of evidence. The City already has an ongoing Endangered Species Act ("ESA") lawsuit against USFWS and BLM pending before U.S. District Judge Robert Takasugi in *City of Santa Clarita v. U.S. Department of the Interior*, No. 02-00697 RMT (PJWx) (C.D. Cal.), challenging both the BO and the SBO, yet no substantive determinations have been made in that case. *See* First Amended Complaint in *City of Santa Clarita v. U.S. Department of the Interior*, No. 02-00697 RMT (PJWx) at ¶¶ 109-122, 195-203, 274-283 (copy attached to Declaration of Edward S. Geldermann in Support of United States' Reply). To the extent the City seeks to challenge the SBO, it is afforded full opportunity to do so in the ongoing *City of Santa Clarita* action.

Moreover, it appears that nothing in the Consent Decree changes the federally approved project with respect to these "new" wells for the Project. The purpose and effects of the additional wells are addressed in the CEQA Findings. (Consent Decree, Exh. E, CEQA Findings, pp. 53-54.) These possible additional well sites were expressly contemplated in the event that monitoring data showed that the existing wells were affecting the Arroyo Toad and the habitat provided by the Santa Clara River. (*See* Casavan Decl., ¶¶ 57-62.) If such effects were seen, wells would be located in different areas to reduce impacts. (*Id.*) In any event, the total amount of water extracted from all of the production wells would not exceed the amounts analyzed in the FEIR and FEIS, and thus, there would not be any increased impacts on the Santa Clara River.

With the level of water extracted remaining the same, this Court finds that the Project remains as previously analyzed

and has not significantly changed in a way relevant to environmental concerns. Since the City's challenge to the Consent Decree based on alleged project changes is without merit, no supplement to the EIS or recirculation of the EIR is required.

**(ii) The City's argument that the so-called "project acceleration" condition triggers recirculation of the FEIR and FEIS is groundless**

The City argues that approval of the Consent Decree would violate CEQA and NEPA because "Condition 9aa" of the Project Conditions allegedly increases the rate of production of minerals beyond that analyzed in the FEIR or FEIS.[5] The City concludes that Project Condition 9aa allows for a "drastic acceleration" in production, incorrectly labeling it as the "Project Acceleration Condition." However, the City's misreading of this condition simply does not trigger recirculation of the FEIR and FEIS.

As explained by CEMEX, the County, and the United States, Condition 9aa is not acceleration clause, it is merely a production cap. County staff originally proposed to CEMEX that there should be limitation or yearly Project production. During the course of mediation and settlement negotiations,

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[5] Condition 9aa states, in relevant part: "Since actual annual production will vary with market demand and market demand can fluctuate by 20%, *no more than* 5.0 million tons of product per year may be produced and shipped during the life of the permit except in emergency situations as declared by a public agency." (Emphasis added).

the Original Parties reached a compromise by negotiating the current production cap set forth in Project Condition 9aa. Under this condition, CEMEX may not produce and ship more than five (5) million tons in any given year.

Because the project description has not changed and the parties have merely negotiated a production cap, there exists no support for the City's arguments that approval of the Consent Decree with Condition 9aa would violate either CEQA or NEPA.

**(iii) The City's argument that a new cancer risk assessment of air quality prepared by the SCAQMD constitutes new information requiring recirculation is meritless**

The City also argues that, with or without project acceleration, significant changes have occurred that make reanalysis and recirculation essential. Referring to a letter from the South Coast Air Quality Management District ("SCAQMD"), the City argues that "new methodology" to quantify the cancer risk from delivery trucks was not considered in the existing environmental documentation.[6]

First, the County contends that it has independently analyzed the substance of the SCAQMD comments, and conducted an independent evaluation of the comments made in SCAQMD's letter did not rise to the level of significant new

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[6] The County notes that it was the City's request that SCAQMD re-review the FEIR and FEIS at such a late date, and the SCAQMD letter was not transmitted to the County, but instead to the City.

information requiring recirculation or additional environmental review pursuant to CEQA Guidelines § 15088.5. Further, according to the County, none of the additional mitigation measures suggested by the SCAQMD would reduce any of the impacts already identified and mitigated in the FEIR.

The first comment the SCAQMD makes is that a risk analysis for emissions from delivery trucks was not included in the environmental review of the Project. The County contends that the August 2000 Additional Environmental Information to the Draft Environmental Impact Report ("AEIDEIR") did include analysis of diesel particulate emissions from delivery trucks on the Project sites. The County concedes that it did not include an analysis of delivery trucks on the Soledad Canyon Road because, at the time the FEIR was being prepared, no such risk analysis was required, nor did SCAQMD have any guidance on diesel emissions, or raise the issue in any of its comment letters. Only in response to the City's demands did SCAQMD bring to light that it had recently developed a draft "Health Risk Guidance for Analyzing Cancer Risks From Mobile Source Idling Emissions for CEQA Air Quality Analysis" in December 2002. Nonetheless, the County evaluated the Project in light of the SCAQMD's Guidance document.

Although the primary access route from the Antelope Valley Freeway is the Soledad Canyon Road, the analysis suggested in the Guidance document does not include truck traffic on highways as an applicable category of truck movement. Instead, the document identifies truck traffic on local streets and/or arterial highways as the movements of concern.[7] However, in fulfilling CEQA's spirit of full

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[7] Soledad Canyon Road is a two-lane road that is a non-urban access road and it is classified as a Major Highway in the County Master

disclosure and environmental consideration, the County evaluated the health risk analysis CEMEX completed pursuant to the Guidance document. *Id.* at 37-38. In conclusion, the cancer risk for on-road diesel truck travel for the Project resulted in less than the threshold of significance of 10 in a million. CEQA Findings, p. 38. Thus, as the County contends, the issue of diesel emissions on Soledad Canyon Road does not rise to the level of significant new information and does not trigger recirculation. It appears that the County has carefully and conscientiously examined any comment letters which purport to raise significant new information, and made specific and extensive Findings that no new information has been raised. *See* CEQA Findings, p. 36-38. The City contends that these Findings in response to the SCAQMD concerns were made "behind closed doors" and are invalid. However, as expressed above, these are merely attempts by the City to interfere with the County's right to settle this litigation on lawful and reasonable grounds.

The Federal Government argues the BLM also analyzed impacts to air quality in the EIS, including issues relating to air toxins and cancer causing discharges. According to the Federal Government, prior to issuance of the FEIR, the BLM issued a Supplemental Draft EIS to further address air quality impacts. In addition, a draft conformity determination for the proposed project was provided to the U.S. Environmental Protection Agency ("EPA"), the U.S.D.A. Forest Services, the California Air Resource Board, the AQMD, the Southern California Association of Governments ("SCAG"), and the general public for a 45-day public review. BLM received eleven comments (including one that specifically addressed cancer risk issues). BLM responded to all of these comments and AQMD concurred in BLM's draft conformity

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Highway Plan. *See* CEQA Findings, p. 37.

determination. AR 25422-25474. BLM thereafter issued its final conformity certification. Contrary to the City's assertions, these issues have not been ignored and were analyzed in the EIS. Thus, the AQMD's asserted concerns about the cancer risk do not require further BLM NEPA evaluation or supplemental NEPA review.

This Court concludes that no significant new information exists as the City claims it does, and no change in circumstances relevant to environmental concerns and bearing upon the proposed action or its impacts has occurred. Accordingly, reanalysis or recirculation is not required at this time.

**(3) The Project findings do not violate CEQA**

The City contends that the Proposed Decree violates CEQA because there must be some sort of new environmental review before the County can repudiate its April 2002 Findings of the Board of Supervisors and Order, Surface Mining Permit Number 91-165(5) ("Board Findings") disapproving the Project, and adopt new Board Findings approving the Project. However, in presenting this argument, the City cites to no statute, regulation or case law in support. The City is unable to demonstrate that the CEQA requires public participation of further environmental review if a public agency reverses itself on a project in light of litigation.

What CEQA does require is that the CEQA Findings be supported by substantial evidence in the record. CEQA Guidelines § 15091(b). This is further substantiated by California case law, which hold that land use findings, such as the Board Findings, must be supported by substantial evidence, but also limits judicial review of the evidence and

calls for deference to the public agency. *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.2d 506, 514-15 (1974). This Court has reviewed the record and finds that the County's new Board Findings are supported by substantial evidence such that it does not violate CEQA compliance and are not sufficient to reject the proposed Consent Decree.

**c. The City's Argument That the Consent Decree Would Also Violate the Federal Clean Air Act, the Federal Clean Water Act, and the Federal Land Policy and Management Act are Further Unsupported Attacks by the City to Block This Project**

Aside from arguing that the Consent Decree violates CEQA and NEPA, the City also argues that the Decree violates the Federal Clean Air Act, the Federal Clean Water Act, and the Federal Land Policy and Management Act. As the City points out, BLM's ROD requires CEMEX to obtain a Clean Air Act permit from the AQMD. The ROD also requires CEMEX to obtain a stormwater permit and water quality certification from the California Regional Water Quality Control Board – Los Angeles Region and the California State Water Resources Control Board. The City asserts that these local air and water permit requirements require compliance with CEQA.

The City urges the Court to disapprove the Consent Decree because the CEQA process used to obtain information and analysis for purposes of assessing CEMEX's compliance with Federal Clean Air Act and the Federal Clean Water Act is incomplete, and according to the City, pages 43-49 of the

proposed Consent Decree purport to preempt the CEQA process that would be required by those other agencies before they can issue the Clean Air Act and Clean Water Act permits.

The United States argues that there is only one permit affected by the proposed Consent Decree, which is the Country surface mining permit that CEMEX applied for pursuant to SMARA. The United States further argues that nothing in the Decree suggests that the preemption findings of the Decree (i.e. the findings that any further County review of CEMEX's SMARA permit application is preempted) extend to or have any bearing upon other permits that CEMEX needs for the Project. According to the United States, to the extent further CEQA review is preempted by the Consent Decree, that preemption applies only to the CEQA process that is ancillary to the County's review of CEMEX's SMARA permit application.

After review of the Consent Decree, this Court agrees with the United States in that nothing in the Decree purports to affect any CEQA processes that may be ancillary to Federal Clean Air Act or Federal Clean Water Act permits that CEMEX needs to operate the project. Thus, nothing in the Consent Decree restrains the AQMD or the State Water Resources Control Board from conducting such CEQA procedures as may be required by law.

### 6. The Consent Decree Does Not Impair Substantial Public Interest

The City argues that substantial public interest will be impaired if the Consent Decree is entered. First, the City argues that its first amendment right to petition government will be impaired because the County will take no actions to redress any City grievances regarding the Project. (Opp.,

47:24 to 48:3). However, as explained above, the County retains full discretion and power to enforce mitigation measures and Project Conditions.

Second, the City's claim that the Consent Decree is an unconstitutional "prior restraint" is similarly without merit. (*Id.*, 48:11-14.) The Consent Decree does not operate as a prior restraint, and indeed allows each of the named individuals in the Consent Decree (including County officials and employees) from expressing their own opinions as individuals. *See* Consent Decree, fn. 1. The case law cited by the City in this regard are inapposite as they deal with prior restraint and publication.[8] As it appears to this Court, nothing in the Consent Decree limits any person's right to freedom of speech.

Third, the City's claim that the Consent Decree infringes upon the public's right of review under NEPA and CEQA is not accurate. The City misrepresents CEQA's requirements for public participation when arguing that the public is being left out of the environmental review process of the Project, and somehow, that results in the abridgement of its First Amendment rights to petition government. However, the truth is that the City participated in the throughout the extensive County review of the Project.

As the County explains in their Reply, the City and the public had ample opportunity to review and comment on the

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[8] *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S 539 (1976) (cannot restrain publication by newspaper/broadcase media of murder trial evidence); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (state commission may not publish list of books it believes offend youth morality); *Near v. Minnesota*, 283 U.S. 697 (1931) (newspaper may publish charges of official dereliction of duty by law enforcement officer)

Project. The County published a Notice of Preparation for the EIR on about November 6, 1991. AR 05524. The City responded with a letter outlining the issues it believed the EIR should address. AR 05550-05551. Once the Draft EIR was complete, the County published a Notice of Completion, requesting public comments on the Draft EIR. The City submitted five comment letters to the DEIR. AR 17927-17930; AR 18042-18043. The CEQA comment period on the Draft EIR closed on November 15, 1999. AR 09252-09254. The County subsequently circulated an Additional Environmental Information to the Draft Environmental Impact Report "AEIDEIR" for public review and comment from August 17 to December 26, 2000. Once more, the City participated in the CEQA process by submitting four comment letters to the AEIDEIR. *Id.* The County held approximately nineteen (19) continued public hearing sessions, including at least ten (10) public hearing sessions with public comments and/or testimony, and two (2) public circulations for comments on revised versions of FEIR. The City participated in at least nine (9) public hearing sessions on the Project and the EIR. AR 18129; AR 06661; AR 06763; AR 08611-08614; AR 09259-09261; AR 10349-10358; AR 11117-11306; AR 17515-17641; AR 17755-17775; AR 19322-19328.

Even after the close of the comment period, the County requested that CEMEX meet with the City and other public groups to attempt to address all community concerns over the Project. AR 17510-17512; AR 19515-19516. As a result of that meeting, the City submitted further materials for the County's consideration of the Project. AR 19569-16000. Accordingly, the County at all times encouraged and facilitated public review of the Project and consulted with the City in the process. Thus, substantial public interest will not impaired by the granting of the Consent Decree.

## III. Conclusion

This Court concludes that this Consent Decree not only results in a much more environmentally friendly Project than originally proposed or that would have resulted from completion of the litigation, but it also resolves this complex and contentious litigation in a lawful and reasonable manner. In light of the foregoing, this Court hereby **grants** the CEMEX's Request for Judicial Notice and **grants** CEMEX's Motion for Entry of Consent Decree as proposed and lodged with the Court.

IT IS SO ORDERED.

DATED: 5/3/04

DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States District Court

D-1

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

**FILED**
CLERK, U.S. DISTRICT COURT
**APR - 8 2004**
CENTRAL DISTRICT OF CALIFORNIA
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CEMEX, INC., a Louisiana corporation
Plaintiff,

vs.

COUNTY OF LOS ANGELES and
DOES 1 through 10, inclusive
Defendant.

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UNITED STATES OF AMERICA,
Plaintiff-Intervenor

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D-2

CASE NO. CV–02-747 DT (FMOx)

**[PROPOSED] ORDER GRANTING EX PARTE APPLICATION OF PLAINTIFF CEMEX, INC. FOR MOTION TO STRIKE OR, IN THE ALTERNATIVE, MOTION TO TAKE OFF CALENDAR MOTION FOR SUMMARY JUDGMENT OF CITY OF SANTA CLARITA**

Judge: Hon. Dickran Tevrizian

The Court having considered the *Ex Parte* Application of Plaintiff CEMEX, Inc. for Motion to Strike or in the Alternative, Motion to Take off Calendar Motion for Summary Judgment of City of Santa Clarita, and all papers filed in connection therewith, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT THE Motion of the City of Santa Clarita for Summary Judgment is taken off calendar. The Motion will be reset for hearing on a date after this Court's ruling on the pending Motion for Approval of Consent Decree, unless that ruling renders moot the Motion for Summary for Judgment.

[Paragraph stricken by court]

DATED: APR - 8 2004

DICKRAN TEVRIZIAN
The Honorable Dickran Tevrizian
Judge of the United States District Court

## United States Constitution
## Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Federal Rules of Civil Procedure
## Rule 19

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the

person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as prescribed in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

**Federal Rules of Civil Procedure**
**Rule 23(a) & (e)**

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

. . . .

(e) **Settlement, Voluntary Dismissal, or Compromise.**

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

**Federal Rules of Civil Procedure**
**Rule 24**

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating

to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any

action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

## California Public Resources Code § 21081

Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

(a) The public agency makes one or more of the following findings with respect to each significant effect:

(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.

(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

## California Public Resources Code § 21153

(a) Prior to completing an environmental impact report, every local lead agency shall consult with, and obtain comments from, each responsible agency, trustee agency, any public agency that has jurisdiction by law with respect to the project, and any city or county that borders on a city or county within which the project is located unless otherwise designated annually by agreement between the local lead agency and the city or county, and may consult with any person who has special expertise with respect to any environmental impact involved. In the case of a project described in subdivision (c) of Section 21065, the local lead agency shall, upon the request of the project applicant, provide for early consultation to identify the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in the environmental impact report. The local lead agency may consult with persons identified by the project applicant who the applicant believes will be concerned with the environmental effects of the project and may consult with members of the public who have made written request to be consulted on the project. A request by the project applicant for early consultation shall be made not later than 30 days after the date that the determination required by Section 21080.1 was made with respect to the project. The local lead agency may charge and collect a fee from the project applicant in an amount that does not exceed the actual costs of the consultations.

(b) In the case of a project described in subdivision (a) of Section 21065, the lead agency may provide for early consultation to identify the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in the environmental impact report. At the request of the lead agency, the Office of Planning and Research shall ensure that each responsible agency, and any public agency that has

jurisdiction by law with respect to the project, is notified regarding any early consultation.

(c) A responsible agency or other public agency shall only make substantive comments regarding those activities involved in a project that are within an area of expertise of the agency or that are required to be carried out or approved by the agency. Those comments shall be supported by specific documentation.

**California Public Resources Code § 21168**

Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure.

In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.

**EXCERPTS FROM**
**[Pages 92-104]**

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CEMEX, INC., a Louisiana Corporation,
Plaintiff,

v.

COUNTY OF LOS ANGELES, and
DOES 1 through 10, inclusive,
Defendants.

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Case No. CV-02-747 DT (FMOx)

**SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, WRIT OF MANDATE, AND DAMAGES**

* * * *

**[Pages 92-104]**

**FIRST CLAIM FOR RELIEF**

(For Declaratory and Injunctive Relief – Federal Preemption of the Los Angeles County Surface Mining and Reclamation Approval Process as Exercised with Respect to CEMEX's Approved Federal Project)

185. Plaintiff refers to and incorporates herein by reference each and every allegation contained in paragraphs 1 through 184, above.

186. The United States' sale of Federal sand and gravel resources at Soledad Canyon to CEMEX was conducted pursuant to a lawful congressional delegation of authority to the Department of the Interior. The decision of the BLM to dispose of these sand and gravel resources was a Federal land-use decision that reflected a careful balancing of competing interests by the BLM. The Federal Contracts were awarded to Plaintiff by the BLM in 1990, pursuant to the Materials Act of 1947, 30 U.S.C. § 601 *et seq*. The Contract quantities and other specifications, such as the time period which the successful bidder has to remove the Contract quantities, have the force of Federal law. The Federal government continues to have an interest in the resources.

187. Plaintiff has pursued a Federal process to obtain review and approval from the BLM of its plan of mining operations to implement the Federal Contracts. In accordance with Federal requirements, Plaintiff submitted mining and reclamation plans to the BLM in May 1991. On August 1, 2000, following a decade of environmental review and exhaustive input from Federal, state, and local agencies, the BLM published its ROD, approving CEMEX's proposed plan of mining operations subject to the adoption of specific mitigation measures. This ROD, and all related environmental review, was affirmed by the IBLA on January 8, 2002.

188. CEMEX first submitted its application for a surface mining permit and reclamation plan to the County of Los Angeles in May 1991, more than ten years ago, but the County still has not approved Plaintiff's application or issued a permit or reclamation plan. Instead, the County Regional

Planning Commission denied the Project in 2000, and the Board twice announced its intent to deny Plaintiff's appeal, before adopting findings and an order of denial on April 23, 2002. This is the case, notwithstanding the United States' ownership and reservation of the mineral resources pursuant to the Stock-Raising Homestead Act, the United States' Notice of Sand and Gravel Sale and public competitive bid process for the right to mine its mineral resources, the award of the Federal Contracts to CEMEX, decisions of this Court and the Ninth Circuit upholding the bid process and award of the Federal Contracts, the United States' $28 million royalty interest in the Federal Contracts, subsequent litigation in this Court affirming the dominance of the Federal mineral estate (again upheld, albeit on other grounds, by the Ninth Circuit), a ten-year Federal environmental review process pursuant to the National Environmental Policy Act, two Biological Assessments under the Federal Endangered Species Act and two Biological Opinions by the U.S. Fish and Wildlife Service, a Final Environmental Impact Statement (following extensive analysis and public comment), the BLM's issuance of its ROD approving CEMEX's proposed Project pursuant to the Federal Contracts, and the IBLA's affirmance of the ROD. This is also the case, notwithstanding the State of California, State Mining and Geology Board's longstanding designation of the Project Site as a "Regionally Significant Construction Aggregate Resource Area," which designation the County accepted.

189. Notwithstanding that controlling Federal land-use decisions as to these Federal resources have been made, County officials have engaged in a demonstrable pattern of obstructive conduct aimed at fatally delaying and/or denying Plaintiff's application and prohibiting this Federally-Approved Project, through interminable and unjustified delays and continuances at virtually every step of the process, through the

proposed imposition of Project conditions and mitigations that are not consistent with the Federal land-use decision-making and/or have no rational nexus to any legitimate environmental objective, and most recently by announcing its intent to deny the Project on specious grounds and then adopting findings and an order to deny the Project.

190. Although Plaintiff's permit and reclamation application was submitted to the County of Los Angeles in May 1991, the County Planning Staff did not complete the Draft EIR until February 1999, and the Regional Planning Commission did not reach any decision until December 1999, after a half a dozen continuances (and did not issue any findings until February 16, 2000), at which point the Planning Commission categorically denied the Project without so much as mentioning the Federal Contracts or the Federal environmental review process in its findings. Moreover, these findings conflicted with prior recommendations of the Planning Commission's own staff, which was recommending approval of the same Project as was approved by the Federal BLM in the ROD. During this stage of the County process, public comment periods were repeatedly, inexplicably, and unjustifiably re-opened and extended, while numerous hearings on Plaintiff's application were unfairly postponed.

191. Plaintiff lodged its appeal of the planning Commission's denial of its permit application with the Board of Supervisors of the County more than two years ago, on March 13, 2000. As at prior stages of the County's permit application process, periods for public comment on Plaintiff's Project were repeatedly, unjustifiably and unreasonably extended by the Board, hearings were unfairly continued – another half dozen times – and conditions were considered and proposed that were in direct conflict with existing Federal requirements. Indeed, the County's Draft Conditions and

Revised Draft Conditions, publicly distributed in April and November 2001, recommend many requirements that conflict with the ROD, and many that lack any rational relation to legitimate environmental objectives. At the public hearing of April 24, 2001, the Board of Supervisors indicated its "intent to deny" the Project, notwithstanding that it had no authority to outright prohibit a Federally-approved mining project on Federal lands. Moreover, during this hearing, the Board instructed County Planning Staff to analyze a host of Project conditions demanded by Project opponents, notwithstanding the fact that many of these conditions conflicted with the Federal Contracts and the ROD. Then, at the public hearing of November 27, 2001, County Supervisors abandoned their pre-announced agenda in order to raise traffic issues about CEMEX's Project that had been resolved years earlier and which would again bring the County conditions into direct conflict with the requirements of the Federal Contracts and the ROD.

192. The Board of Supervisors' excuse for postponing a vote on Plaintiff's Project at the November 27, 2001 hearing came after an eleventh-hour "discovery" by the County's Department of Public Works of previously unidentified traffic concerns that had been "brought to [their] attention" by Fifth District Supervisor Antonovich, "working behind the scenes." Yet these vaguely described traffic issues were resolved to the DPW's satisfaction over the course of three departmental reviews (in 1995, 1998, and 2000), a formal written response by the DPW (in June 2001) containing no hint that it might consider the EIR to be inadequate with respect to traffic, and three years of silence or non-objection by the DPW (including the Traffic and Lighting Division) to the traffic analysis for the Project. DPW had also previously reconfirmed the adequacy of the existing EIR analysis, including PCE ratios. DPW had also previously concluded that one of the mitigation measures

discussed on November 27, 2001 – the widening of Soledad Canyon Road – was infeasible. Other possible areas of further analysis suggested on November 27 – e.g., rail-haul, and reducing the size of the Project – had been rejected by the Federal government and were and are not consistent with the Federal Contracts and the ROD. Supervisor Antonovich also seized upon the Soledad Canyon Road questions he had brought to DPW's attention "behind the scenes," by suggesting there might be some infirmity with respect to the 14 Antelope Valley Freeway impact analysis, even though the proposed Final EIR had concluded that the Project would have no significant impacts there, and DPW had voiced no concerns as to the 14 Antelope Valley Freeway.

193. Concomitant with imposing the multitude of delays described above, in the course of reviewing Plaintiff's Project the County of Los Angeles had, during those delays, consistently subjected the Project to a series of shifting and novel environmental review standards and criteria for approval, which were focused not on achieving "reasonable environmental regulation," but rather on creating even further delays and otherwise frustrating the approved Federal Project. For example, during its January 23, 2001 hearing, the Board of Supervisors required CEMEX to negotiate with the City of Santa Clarita and other Project opponents as a prerequisite to the Board rendering a final decision in April. When the parties completed that process and returned to the Board on April 24, 2001, with a publicly distributed proposed Final EIR ready for certification, the Board refused to certify the EIR, refused to render a final decision on CEMEX's appeal, continued the hearing, incorporated the CEMEX-proposed compromise conditions into the Project, and then, using the CEMEX conditions as a starting point, initiated a new process in which it directed that *all* of the conditions proposed by Project opponents be addressed in a future proceeding. At the next

hearings, when it ultimately occurred in November, that new process begun in April had been completed by Planning Staff and included in its November Staff Report analyzing all Project opponent conditions. Even though CEMEX had been led to believe the Board would address the merits of the Project and certify the Final EIR (which, again, had been publicly distributed), the Board created yet another new process impediment by questioning whether the traffic analysis adopted by the County of Los Angeles for several years was in error, thereby conjuring yet another basis for a continuance.

194. All of these process delays at the County occurred in the context of Project opponents (and CEMEX's business competitor Curtis) having vowed to use political influence to delay the County permit approval process, Fifth District Supervisor Antonovich "whip[ping] up" crowds in opposition to the Project and encouraging them to "build a case," Supervisor Antonovich's former field representative and then City of Santa Clarita Mayor Darcy saying "[we] will do anything necessary to stop this project," local opposition to *any* mining project on the Site (irrespective of prior Federal land-use decisions and Federal law), a coordinated opposition by Supervisor Antonovich and other Project opponents in the Federal permitting and appeals process, criticism by Supervisor Antonovich of uniform County traffic analysis standards as "wrong" or "nonsense," a $1.2 million public relations campaign meant to kill the Project (replete with half-truths and hyperbole, admittedly intended to be inflammatory), two unsuccessful efforts by a U.S. Congressman to introduce legislation to kill the Project at the urging of local constituents, an unsuccessful attempt by the U.S. Congressman (at the request of a business competitor of CEMEX) to challenge the Federal Contract bid award through the Department of Interior, Office of Inspector General, repeated motions for continuances by Supervisor Antonovich

and/or his local constituents, and more.

195. This process of obstructive delay neared its climax with the hearing of February 26, 2002 when the Board of Supervisors approved another motion indicating their intent to deny CEMEX's appeal, having the effect of prohibiting the Project altogether. This motion was adopted after CEMEX had recently paid $40,000 in environmental review fees to the County, DPW had completed a traffic analysis as presented in the February DPW Report, DPW testified at the hearing that the conditions agreed to by CEMEX would address DPW's concerns over the need for impact mitigation, and CEMEX is within its rights to seek recourse from the Courts to stop the endless delays imposed on it.

196. Supervisor Antonovich brought the February 26, 2002 motion for the Board to deny the Project on account of CEMEX's alleged "refusal to cooperate," supposedly evidenced by, among other things, CEMEX's filing of the present lawsuit to preserve its rights. The motion was passed by the Board of Supervisors despite the fact that the County could have either certified the existing EIR and approved the Project, or the County could have completed and circulated a revised EIR (especially given that DPW already had completed a supplemental traffic analysis), since it was the County's statutory obligation to complete and certify the EIR. Moreover, County Counsel specifically instructed the Supervisors that this was an option. There was no reason at all for the County to deny the Project at the hearing since CEMEX had agreed to new traffic mitigations which met DPW's concerns and CEMEX had provided further evidence that the existing EIR was adequate for certification. By pursuing this procedural stratagem, the County thus avoided or forestalled any decision on the substantive merits of CEMEX's Federally-approved Project, and instead delayed

that decision further and bought itself some more time to create even further delays.

197. The County followed its inappropriate February 26, 2002 vote of intent to deny with its April 23, 2002 adoption of findings and an order to deny the Project. In so doing, the Board instructed Counsel to prepare, and then adopted, without public discussion, findings that go far beyond the traffic analysis and CEQA procedural issues which had been the subject of its hearings and the basis of its decision-making over the previous five months. The Board thus denied CEMEX the opportunity to be heard as to substantive matters made part of the findings.

198. The decade-long County process culminating in a procedurally-based denial of CEMEX's permit application has frustrated and threatens to further impair and frustrate the implementation of an important Federal land-use decision. The attempt by the County of Los Angeles to subvert the limited albeit legitimate purpose of the local review and approval process into a never ending delay and then denial of a Federally-approved Project constitutes a form of prohibition of the Project. In particular, this abuse of the County's permitting and reclamation process has imposed additional costs, uncertainties and delays on the Project sufficient to jeopardize the implementation of the Federal land-use decisions determined in the Federal Contracts and the ROD. Such a *de facto or de jure* prohibition is contrary to law and places the County's permit and reclamation plan approval process itself, as applied to Plaintiff CEMEX's permit and reclamation plan application, in conflict with Federal land-use determinations. The County's permit and reclamation plan approval process, as actually applied to CEMEX's surface mining permit and reclamation plan application, has consequently become a direct obstacle to the accomplishment

of the full purposes and objectives of Congress in the Materials Act of 1947. Opponents of the Project have used and, if the application is remanded to the County, will continue to use, the local permitting process as a means of thwarting the authority of the BLM to dispose of mineral material resources, thereby defying Congressional intent in enacting the Materials Act of 1947. The current and any further process of the County for the approval of CEMEX's application for a surface mining permit and reclamation plan is therefore preempted by the Materials Act of 1947, the Federal Contracts, and the ROD, pursuant to the Property and Supremacy Clauses of the U.S. Constitution.

199. The County's *de facto* prohibition of the Project through years of delays, the continued consideration of conditions that would frustrate Federal requirements, and an interminable environmental review and hearing process, including its recent *de jure* prohibition through the Supervisors' announced intent and adopted order to deny the Project, has created adversity to Plaintiff's interests. An actual and justifiable controversy has therefore arisen and now exists between Plaintiff and Defendant concerning their rights and other legal relations with respect to the implementation of the Federal Contracts and the ROD, for which there is no adequate remedy at law. The County of Los Angeles continues to act as though it can delay this Project indefinitely and impose conditions inconsistent with the Federal Contracts and the ROD and, after the filing of this lawsuit, has seized upon specious pretexts toward denial of the Project, before purporting to deny the Federally-approved Project altogether. Plaintiff believes that the County cannot so act to frustrate Federal intent, and Plaintiff will be irreparably harmed if the County process is allowed to proceed further.

220. Plaintiff CEMEX therefore requests declaratory

and injunctive relief, as set forth in the Prayer for Relief below.

**SECOND CLAIM FOR RELIEF**
(For Declaratory and Injunctive Relief – Federal Preemption of County Actions and Conditions Inconsistent with Approved Federal Project)

201. Plaintiff refers to and incorporates by reference each and every allegation contained in paragraphs 1 through 200, above.

202. In its ROD, the BLM approved Plaintiff's mining and reclamation plan of operations for the Project with mitigation measures regarding traffic, air quality, cultural resources, visual qualities, noise, water quality, water resources, geotechnical considerations and public health. The BLM also considered and eliminated a variety of alternatives, such as rail-haul (transporting aggregate and other material by rail instead of truck) and the mining of reduced quantities of sand and gravel. The BLM-approved Project was subsequently affirmed by the IBLA. The BLM's findings, elimination of alternatives, approval of Plaintiff's mining plan, including quantities of mining to allow implementation of the Federal Contracts, and required mitigation measures, as set forth in the Federal Contracts and the ROD, have the force of Federal law. Once the BLM has approved a permittee's plan of operations, as Plaintiff's plan has been approved, Federal regulations require that the permittee not deviate from this approved plan.

203. At its public hearings, in its written communications with Plaintiff, and in its proposed Draft Conditions and Revised Draft Conditions presented in April and November 2001, the County of Los Angeles considered, proposed, and circulated various conditions for the approval of Plaintiff's

application for a surface mining permit and reclamation plan which conflict with, are inconsistent with, or would frustrate the requirements of the Federal Contracts and the ROD. Because these conditions are neither reasonable environmental regulations nor consistent with existing Federal requirements, they would be preempted by Federal law if imposed. In its consideration of Plaintiff's application for a surface mining permit and reclamation plan, the County has given consideration to conditions that conflict with the ROD, the Federal Contracts, and the Materials Act of 1947, or that would frustrate the purposes of the Materials Act, and the BLM's mandate under Federal law including but not limited to the following:

- Operating Hours/Truck Ban or Limit During Business Hours: This condition, as described in paragraph 124, would negatively affect CEMEX's ability to compete in the marketplace, thereby rendering the Project infeasible, and thus frustrating the ROD and the Federal Contracts.

- Production Restriction: This condition, as described in paragraph 124, would directly conflict with the Federal Contracts' timing provisions, which allow mining under Phase 1 in less than or up to 10 years, in conformance with the BLM Mineral Material Sales Regulations. This restriction would also restrict the Federal government's ability to sell additional minerals it owns in the Project area by prolonging the duration of CEMEX's mining Project, thereby frustrating the Federal government's future interests to develop the public resources at the Site.

- Project Oversight (Monitor): This condition, as

described in paragraph 124, would establish an unnecessary and inappropriate precedent for future BLM mineral contracts, and given the enormous cost, would frustrate and interfere with future BLM bidding for Contracts, thereby potentially restricting or diminishing Federal royalty revenues.

- Reporting Requirements: This condition, as described in paragraph 124, would impose an unworkable regulatory scheme which would frustrate and conflict with the Project and serve to disclose proprietary information to business competitors and other parties, and would conflict with the Federal regulation of mining by establishing an inappropriate precedent for future Federal mineral resource contracts. The proposed reporting requirements relating to water resources, biological resources, air quality and cultural resources require reporting that far exceeds that provided for in the ROD and required under Federal law, thus leading to potential conflict with the Federal requirements.

- Exhaust Particulate Filter Truck Retrofit: As described in paragraph 124, this condition would require CEMEX, alone, to implement filters on its trucks that the County's own Staff acknowledges have not been required of any other project, and that conflict with applicable Federal and state standards.

- Cultural Resource: As described in paragraph 124, this condition exceeds Federal standards, is unrelated to environmental mitigation, and would force CEMEX to notify Project opponents currently in litigation against the Project of any discovery of cultural resources within 24 hours of such a discovery.

- Rail-haul: As described in paragraph 124, this condition would require the Federal government, in theory, to prepare a new biological assessment, new biological opinion, new EIS, and new ROD. However, it is questionable whether a non-jeopardy biological opinion could be obtained for a rail-haul project. Thus, the imposition of rail-haul would make it impossible for CEMEX to comply with the approval set forth in the existing ROD. Moreover, County Planning Staff did not recommend requiring rail-haul because, among other things, it was not part of the Project before the Board and because it would result in greater environmental impacts.

- Imported Water: As described in paragraph 124, this condition would conflict with the ROD which specifically analyzed the importation of water for the Project and rejected this alternative. Moreover, this condition, even if feasible, would result in severe financial costs to CEMEX, which would limit the feasibility of the Project, thereby impacting the payment of royalties to the BLM under the Contracts.

- No Ridgeline Reduction: As described in paragraph 124, this condition would conflict with the 56.1 million tons of production approved in the ROD and the Federal Contracts. Moreover, the BLM considered and rejected a "Reduced Quantity Mining Concept Alternative" in the ROD. Finally, restrictions on Project mining would result in adverse precedent for future Federal competitive sales and contracts, thereby impacting the efficacy of the competitive bidding process under the Materials Act of 1947.

- School Air Conditioning Retrofitting: As described in paragraph 124, this condition, which would result in virtually no benefit to the community, would require enormous financial expenditures that would severely affect the implementation of the Contracts and the payment of royalties to the BLM. Thus, this condition would frustrate the Federal decisions involved, as well as the Congressional intent as manifested in the Materials Act of 1947.

204. After imposing months of delays to analyze and debate these violative conditions, and then reviewing CEMEX's lawsuit filed on January 25, 2002, cataloging the numerous examples of County action inconsistent with Federal law, the Board avoided reaching a substantive determination on these proposed conditions and instead, on February 26, 2002, announced for a second time its intent to deny CEMEX's appeal of the permit application denied by the Regional Planning Commission, even though it was clear under existing law that the County could not, and cannot, block this Federally-approved Project. The second intent to deny was based on the specious grounds that CEMEX had refused to cooperate because it disagreed that a new study of the traffic issue (which DPW had in fact completed) was needed, it opposed re-circulation of the EIR, and it had filed this lawsuit to enforce its rights. The County's frustration of the Federally-approved Project on these pretexts provides yet another example of the County's deliberately acting in a manner inconsistent with Federal requirements.

205. Still later, on April 23, 2002, the Board went a step further in defying Federal law and the Federal Contracts, by adopting findings and an order to deny the Project, notwithstanding the BLM's Record of Decision and the IBLA's Order upholding that ROD. The County thus brought

to a close this chapter of its dilatory process, but not before instructing its Counsel to prepare findings to justify the Board's decision on grounds that it did not discuss or hear. Furthermore, the County made clear that it was denying the Project "as currently presented"; in other words, the County anticipates that any further County administrative process will include further consideration of the above-described conditions, notwithstanding that they would conflict with and interfere with the Federally-approved Project.

206. The County's repeated and continued consideration and circulation of proposed conditions inconsistent with Federal requirements as conditions for approval of Plaintiff CEMEX's application for a surface mining permit and reclamation plan, followed by its intended prohibition of the Federally-approved Project, and order of denial, have created adversity between Plaintiff and Defendant. An actual and justiciable controversy has therefore arisen and now exists between Plaintiff and Defendant concerning their rights and other legal relations with respect to the implementation of the Federal Contracts and the ROD, for which there is no adequate remedy at law. Plaintiff will suffer irreparable harm if Defendants are allowed to impose conditions on the Project that are inconsistent with existing Federal conditions, or to fail to act in a timely manner to approve a Project consistent with the Federal land-use planning and decisions embodied in the ROD, or to deny the Project outright.

207. Plaintiff CEMEX accordingly seeks declaratory relief and injunctive relief, as set forth in the Prayer for Relief below.

# APPENDIX G

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FILING FEE EXEMPT
GOV'T CODE § 6103

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CEMEX, INC., a Louisiana Corporation,
Plaintiff,

v.

COUNTY OF LOS ANGELES, and
DOES 1 THROUGH 10, INCLUSIVE
Defendants.

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UNITED STATES OF AMERICA,
Plaintiff-in-Intervention.

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City of Santa Clarita,
Defendant-in-Intervention.

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Case No. 0200747 DT (FMOx)

Judge Dickran Tevrizian
Courtroom 880

**ANSWER OF THE CITY OF SANTA CLARITA TO SECOND AMENDED COMPLAINT OF CEMEX**

Date: TBD
Time: 10:00 a.m.
Dept: 880

Complaint Filed: 01/25/02

First Amended
Complaint Filed: 04/11/02

Second Amended
Complaint Filed: 05/09/02

Trial Date: None set

COMES NOW the City of Santa Clarita ("City"), by and through its undersigned attorneys, and pursuant to Fed.R.Civ.P. 24(c), sets forth its claims and defenses to CEMEX, Inc.'s Second Amended Complaint for Declaratory and Injunctive Relief, Writ of Mandate, and Damages.

## INTRODUCTION

1. The allegations set forth in paragraph 1 are denied.

2. The allegations set forth in paragraph 2 are denied.

3. The allegations set forth in paragraph 3 are denied.

4. With regard to the allegations set forth in paragraph 4, the City admits that members of the Los Angeles County

Board of Supervisors ("LABOS") have continued to advance feasible alternatives and mitigation measures, including the "rail-haul" alternative and a reduction in quantity of sand and gravel to be mined. The City also admits that members of the LABOS have moved to deny the Soledad Canyon Sand and Gravel Project ("Soledad Canyon Project") outright. The City denies, however, any and all allegations set forth in paragraph 4 that the above-described actions of members of the LABOS are inappropriate, illegal, or exceed County authority over the Soledad Canyon Project.

5. The allegations set forth in paragraph 5 are denied.

6. The allegations set forth in paragraph 6 are denied.

7. With regard to the allegations set forth in paragraph 7, the City admits that on February 26, 2002 the LABOS voted its intent to deny CEMEX' surface mining permit application. The reasons for the denial are set forth in the LABOS April 18, 2002 Findings. All remaining allegations in paragraph 7 are denied.

**JURISDICTION AND VENUE**

8. The allegations set forth in paragraph 8, insofar as they assert that the County, and other unnamed defendants, have violated the rights of CEMEX, are denied.

9. The allegations set forth in paragraph 9, insofar as they assert that this Court has jurisdiction to hear CEMEX's claims, are denied.

10. The allegations set forth in paragraph 10, insofar as they assert that this Court has jurisdiction to hear CEMEX's claims, are denied.

11. With regard to paragraph 11, the City admits that the County acts under the color of law when reviewing an application for a surface mining permit.

12. The allegations set forth in paragraph 12 are denied.

13. With regard to paragraph 13, the City admits that the Soledad Canyon Project site is in the Central District of California. The City denies any and all allegations set forth in paragraph 13 insofar as they assert that this Court has jurisdiction hear CEMEX's claims.

14. The allegations set forth in paragraph 14 are denied.

**THE PARTIES**

15. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 15.

16. With regard to paragraph 16, the City admits that the County is public body and a subdivision of the State of California, and that the County can be subjected to suit. The City denies, however, any and all allegations set forth in paragraph 16 insofar as they assert that this Court has jurisdiction to hear CEMEX's claims.

17. With regard to paragraph 17, the City admits that the County can be a "lead agency" for review and approval of surface mining permits.

18. With regard to paragraph 18, the City admits that the County can act as a "lead agency" under the California Environmental Quality Act ("CEQA").

19. The allegations set forth in paragraph 19, insofar as they assert that other unnamed defendants have violated the rights of CEMEX, are denied.

20. The allegations set forth in paragraph 20 are denied.

## STATEMENT OF FACTS

21. With regard to paragraph 21, the City asserts that the federal laws and regulations set forth therein speak for themselves. The City denies that the surface estate is held in private ownership as the City purchased the fee ownership of the site in February of 2004. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 21.

22. With regard to paragraph 22, the City asserts that the Supreme Court decision cited therein speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of the other allegations set forth in paragraph 22.

23. With regard to paragraph 23, the City asserts that the United States District Court case cited therein speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of the other allegations set forth in paragraph 23.

24. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 24.

25. With regard to paragraph 25, the City asserts that the California State Mining and Geology Board Guidelines for Classification and Designation of Mineral Lands, California

Surface Mining and Reclamation Policies and Procedures speaks for itself. The City denies all the allegations set forth in paragraph 25 insofar as they assert that the opposition to the Soledad Canyon Project is a land use conflict or that opponents of the Project claim mining is incompatible with the area.

26. With regard to paragraph 26, the City asserts that the letter written by JoAnn Darcy speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 26.

27. With regard to paragraph 27, the City asserts that the Stipulation for Compromise Settlement cited therein speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 27.

28. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 28.

29. With regard to paragraph 29, the City asserts that the 1989 Environmental Assessment cited therein speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 29.

30. The City admits that CEMEX, formerly TMC, was the successful bidder for the federal contract to mine sand and gravel from Soledad Canyon. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 30.

31. With regard to paragraph 31, the City asserts that the

two federal contracts cited therein speak for themselves.

32. With regard to paragraph 32, the City asserts that the United States District Court and Ninth Circuit Court of Appeals cases speak for themselves. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 32.

33. With regard to paragraph 33, the City asserts that the United States District Court decision cited therein speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 33.

34. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 34.

35. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 35.

36. With regard to paragraph 36, the City asserts that the November 14, 1997 Statement of Uncontroverted Facts and Conclusions of Law cited therein speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 36.

37. With regard to paragraph 37, the City asserts that the December 3, 2000, news article appearing in the Newhall Signal speaks for itself. The City denies, however, any and all allegations set forth in paragraph 36 insofar as they assert that the City acted inappropriately and illegally, or has attempted to unduly influence decisions made by the County.

38. The allegations set forth in paragraph 38, insofar as they assert that the City's opposition to the Soledad Canyon Project was for any reason other than the Project's impact to the environment, are denied.

39. With regard to paragraph 39, the City admits that CEMEX submitted a proposed mining and reclamation plan to the BLM sometime in 1990.

40. With regard to paragraph 40, the City admits that the BLM issued a Notice of Intent to prepare a Draft Environmental Impact Statement ("DEIS") in 1995. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 40.

41. With regard to paragraph 41, the City admits that the BLM released a Final Biological Assessment in June 1996, which analyzed the Soledad Canyon Project's impact on the unarmored threespine stickleback. The City also admits that the BLM initiated formal consultation with the United States Fish & Wildlife Service ("FWS") to analyze the Project's impact on the stickleback. The City denies, however, any allegations set forth in paragraph 41 insofar as they assert that the BLM's evaluation of the Soledad Canyon Project's impact on endangered and threatened species was adequate and in compliance with applicable law.

42. With regard to paragraph 42, the City admits that the FWS released a Biological Opinion evaluating the Soledad Canyon Project's impact on the unarmored threespine stickleback on January 14, 1998. The City also admits that the 1998 Biological Opinion concluded that the Soledad Canyon Project would not jeopardize the continued existence of the stickleback. The City denies, however, all allegations set forth in paragraph 42 insofar as they assert that the FWS'

evaluation of the Soledad Canyon Project's impact on endangered or threatened species was adequate and in compliance with applicable law.

43. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 43.

44. With regard to paragraph 44, the City admits that the BLM completed the DEIS in May 1999. The City denies, however, all allegations set forth in paragraph 44 insofar as they assert that the BLM's evaluation of the Soledad Canyon Project's impact on the environment was adequate and in compliance with applicable law.

45. With regard to paragraph 45, the City admits that two public hearings were held by the BLM on June 2, 1999. The City also admits that the comment period for the DEIS was extended by the BLM. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 45.

46. With regard to paragraph 46, the City admits that the BLM prepared a supplement to the DEIS ("SDEIS"), which identified the Reduced North Fines Storage Area Alternative ("RNFSA") as the agency's preferred alternative. The City also admits that the SDEIS was subject to a two-month comment period. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 46.

47. The allegations set forth in paragraph 47, insofar as they assert that the City, and/or City representatives, acted inappropriately or illegally during the April 2000 meeting with the BLM and County officials, are denied.

48. With regard to paragraph 48, the City admits that the BLM published a Final EIS on June 2, 2000. The City denies, however, any allegations set forth in paragraph 48 insofar as they assert that the Final EIS adequately evaluated the Soledad Canyon Project's impact on the environment or was in compliance with applicable law.

49. With regard to paragraph 49, the City asserts that the August 1, 2000 Record of Decision ("ROD") cited therein speaks for itself. The City denies all allegations set forth in paragraph 49 insofar as they assert that there has been a decade of environmental review of the Soledad Canyon Project.

50. With regard to paragraph 50, the City asserts that the August 1, 2000 ROD cited therein speaks for itself.

51. With regard to paragraph 51, the City admits that it filed an appeal of the August 1, 2000 ROD with the Interior Board of Land Appeals ("IBLA") in Virginia. The City also admits that it petitioned the IBLA for a stay of proceeding pending appeal. The City asserts that the IBLA declined to take action on the stay request pending final determination by the County.

52. With regard to paragraph 52, the City admits that the BLM filed a Request for Expedited Review of the appeals by the IBLA. The City asserts that the letter from the Assistant Secretary of the Interior speaks for itself.

53. With regard to paragraph 53, the City admits that the IBLA granted the BLM's request for expedited review.

54. With regard to paragraph 54, the City admits that the IBLA did issue an order closing briefing in the appeal. The

City further asserts that the IBLA decision cited in paragraph 54 speaks for itself. All other allegations set forth in paragraph 54 are denied.

55. With regard to paragraph 55, the City asserts that the January 8, 2002 IBLA decision cited therein speaks for itself. The City denies, however, all allegations set forth in paragraph 55 insofar as they assert that the IBLA decision was legally supportable or in compliance with applicable law.

56. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 56.

57. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 57.

58. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 58.

59. With regard to paragraph 59, the City asserts that the press release cited therein speaks for itself. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 59.

60. The allegations set forth in paragraph 60, insofar as they describe the purpose of the TMC Advisory Executive Committee, are denied.

61. With regard to paragraph 61, the City asserts that the press release cited therein speaks for itself.

62. The City is without sufficient information in which

to form a belief as to the accuracy of the allegations set forth in paragraph 62.

63. The allegations set forth in paragraph 63 are admitted.

64. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 64.

65. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 65.

66. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 66.

67. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 67.

68. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 68.

69. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 69.

70. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 70.

71. The City is without sufficient information in which

to form a belief as to the accuracy of the allegations set forth in paragraph 71.

72. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 72.

73. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 73.

74. With regard to paragraph 74, the City admits that the public review process for the Draft EIR was nine months. The City denies, however, any allegations set forth in paragraph 74 insofar as they assert that the nine-month review process was in violation of CEQA.

75. With regard to paragraph 75, the City admits that an Additional Environmental Information to the Draft EIR ("AEIDEIR") document was prepared in August 2000 and circulated for a four-month public review. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 75.

76. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 76.

77. The allegations set forth in paragraph 77, insofar as they assert that the County's authority under SMARA and CEQA, as it relates to the Soledad Canyon Project, is limited by federal law, are denied.

78. With regard to paragraph 78, the City asserts that the 1999 Staff Analysis for the Project cited therein speaks for itself.

79. With regard to paragraph 79, the City admits that the April 21, 1999 Planning Commission hearing resulted in a 60-day continuance to provide time for CEMEX to respond to issues raised during the hearing. The City denies, however, all allegations set forth in paragraph 79 insofar as they assert that the City improperly or unduly influenced the County's decision to continue the hearing.

80. With regard to paragraph 80, the City admits that a hearing was held on June 2, 1999 and that the comment period for the Draft EIR was continued an additional 90 days. The City denies, however, all allegations set forth in paragraph 80 insofar as they assert that the City improperly or unduly influenced the County's decision to continue the comment period.

81. With regard to paragraph 81, the City admits that a hearing was held on July 14, 1999 and that the matter was continued until September 22, 1999. The City denies, however, all allegations set forth in paragraph 81 insofar as they assert that the City improperly or unduly influenced the County's decision to continue the hearing.

82. The allegations set forth in paragraph 82 are admitted.

83. With regard to paragraph 83, the City admits that a hearing was held on September 15, 1999 and that the comment period for the Draft EIR was continued for an additional 60 days. The City denies, however, all allegations set forth in paragraph 83 insofar as they assert that the City

improperly or unduly influenced the County's decision to continue the comment period.

84. The allegations set forth in paragraph 84 are admitted.

85. With regard to paragraph 85, the City admits that the BLM did decide to prepare a supplement to the federal DEIS and that members of the LABOS did move to have the Soledad Canyon Project taken off calendar as a result of the BLM's decision.

86. With regard to paragraph 86, the City admits that the County Planning Commission did vote to deny CEMEX's application for a surface mining permit. The City denies, however, all allegations set forth in paragraph 86 insofar as they assert that the Planning Commission's decision to deny the application was improper, illegal, or in excess of the Planning Commission's authority.

87. With regard to paragraph 87, the City admits that the Planning Commission issued its findings in support of denial on February 16, 2000.

88. The allegations set forth in paragraph 88 are admitted.

89. With regard to paragraph 89, the City admits that the AEIDEIR was prepared and circulated on August 17, 2000. The City is, however, without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 89.

90. With regard to paragraph 90, the City admits that a rally in opposition to the Soledad Canyon Project was held

prior to the scheduled October 24, 2000 hearing and was attended by 5th District Supervisor Antonovich. The City denies, however, all allegations set forth in paragraph 90 insofar as they assert that the rally held by the City, or Supervisor Antonovich's attendance, was improper or illegal.

91. With regard to paragraph 91, the City admits that it has taken a position in opposition of the Soledad Canyon Project, as presently proposed. The City further asserts that the press released cited in paragraph 91 speak for themselves.

92. With regard to paragraph 92, the City admits that it the LABOS granted its motion to extend the comment period for the AEIDEIR for an additional 60 days. The City denies, however, all allegations set forth in paragraph 92 insofar as they assert that the City's motion to continue the comment period was for an improper purpose, or that the LABOS' decision to extent the comment period was improper, unnecessary, or illegal.

93. With regard to paragraph 93, the City admits that it has acted to ensure that the Soledad Canyon Project does not adversely and unnecessarily impact City resources. The City asserts that the statements cited in paragraph 93 speak for themselves. The City denies, however, all allegations set forth in paragraph 93 insofar as they assert that statements made by the City were exaggerations or half-truths.

94. With regard to paragraph 94, the City asserts that the editorial cited therein speaks for itself.

95. With regard to paragraph 95, the City admits that the LABOS convened to consider CEMEX's appeal of the Planning Commission's decision on January 23, 2001. The City is, however, without sufficient information in which to

form a belief as to the accuracy of all other allegations set forth in paragraph 95.

96. The allegations set forth in paragraph 96 are admitted.

97. With regard to paragraph 97, the City admits that it participated in negotiations with CEMEX. The City denies, however, all allegations set forth in paragraph 97 insofar as they assert that CEMEX offered numerous conditions that were beyond what was required to mitigate the impacts that the Soledad Canyon Project would have on the environment.

98. With regard to paragraph 98, the City admits that it, along with several other opponents to the Soledad Canyon Project, created the TMC Executive Advisory Committee. The City also admits that Ben Curtis has attended several TMC Executive Advisory Committee meetings. The City denies all other allegations set forth in paragraph 98.

99. With regard to paragraph 99, the City admits that the cited proposals were made to CEMEX during negotiations but denies that the TMC Executive Advisory Committee made the proposals. The City denies, however, all allegations set forth in paragraph 99 insofar as they assert that the proposals are in violation or conflict with federal law or are preempted by federal law, or place CEMEX at a competitive disadvantage.

100. The allegations set forth in paragraph 100, insofar as they assert that the proposals made to CEMEX were in conflict with federal law or otherwise preempted by federal law, are denied.

101. With regard to paragraph 101, the City admits that some of the proposed conditions were added by the County as

conditions to the Soledad Canyon Project. The City denies, however, that virtually all of the conditions were added to the Project by the County.

102. With regard to paragraph 102, the City admits that the LABOS held a hearing to consider CEMEX's appeal of the Planning Commission's decision on April 24, 2001. The City is, however, without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 102.

103. With regard to paragraph 103, the City admits that on April 24, 2001, the LABOS indicated an intent to deny the Soledad Canyon Project, as currently proposed, and instructed the Regional Planning Department to study the various alternatives and mitigation measures introduced by the community. The City also admits that the hearing was continued until June 26, 2001. The City denies, however, all allegations set forth in paragraph 102 insofar as they assert that the LABOS' actions on April 24, 2001 were improper, illegal, or outside its authority.

104. With regard to paragraph 104, the City admits that members of the LABOS were critical of the environmental review process for the Soledad Canyon Project and questioned the method used to evaluate the Project's traffic impacts. The City denies, however, all allegations set forth in paragraph 104 insofar as they assert that the LABOS' criticism of the Soledad Canyon Project's environmental review was improper, inappropriate, or outside its authority.

105. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 105.

106. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 106.

107. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 107.

108. With regard to paragraph 108, the City admits that Supervisor Antonovich has, at various times, attended public hearings held by the Santa Clarita City Council. The City denies, however, all allegations set forth in paragraph 107 insofar as they assert that Supervisor Antonovich's attendance at any public hearing held by the Santa Clarita City Council is improper or illegal.

109. With regard to paragraph 109, the City admits that in May and June 2001, biologists hired by the City discovered the presence of the endangered southwestern arroyo toad at the Project site. The City also admits that it petitioned the BLM to re-initiate formal consultation with the FWS under the Federal Endangered Species Act ("ESA") and the County to recirculate the EIR under CEQA.

110. With regard to paragraph 110, the City admits that the scheduled June 26, 2001 hearing was continued to August 28, 2001 and that CEMEX initiated the request to have the hearing continued.

111. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 111.

112. With regard to paragraph 112, the BLM news release speaks for itself.

113. With regard to paragraph 113, the City admits that on August 6, 2001, the BLM issued a Supplemental Biological Assessment addressing the discovery of the arroyo toad at the Project site. The City also admits that the BLM requested re-initiation of formal consultation under ESA. The City denies, however, all allegations set forth in paragraph 113 insofar as they assert that the BLM's Supplemental Biological Assessment adequately evaluated the Soledad Canyon Project's impact on the arroyo toad or was in compliance with applicable law.

114. With regard to paragraph 114, the City admits that the August 28, 2001 hearing was continued until November 27, 2001 to provide time for the FWS' evaluation of the Soledad Canyon Project's impact on the arroyo toad.

115. With regard to paragraph 115, the City admits that on October 25, 2001, the FWS issued a non-jeopardy opinion regarding the Soledad Canyon Project's impact on the arroyo toad. The City denies, however, all allegations set forth in paragraph 115 insofar as they assert that the Biological Opinion issued by the FWS adequately evaluated the Soledad Canyon Project's impact on the arroyo toad or was in compliance with applicable law.

116. With regard to paragraph 116, the City admits that on November 13, 2001 the County publicly distributed a proposed Final EIR, which addressed the Soledad Canyon Project's impact on the arroyo toad. The City denies, however, all allegations set forth in paragraph 116 insofar as they assert that the County's evaluation of the Project's impact on the arroyo toad was adequate or in compliance with applicable law.

117. With regard to paragraph 117, the City admits that

it requested a continuance of the November 27, 2001 hearing in order to fully evaluate the recent publication by the county of the proposed final EIR.

118. With regard to paragraph 118, the City admits that the LABOS denied a motion to continue the November 27, 2001 hearing.

119. With regard to paragraph 119, the City admits that the Planning Staff issued a report on November 5, 2001, which analyzed the project alternatives and mitigation measures proposed by the community. The City asserts that the Planning Staff's report speaks for itself.

120. With regard to paragraph 120, the City asserts that Planning Staff's report and the Regional Solicitor's opinion cited therein speak for themselves. The City denies, however, all allegations set forth in paragraph 120 insofar as they assert that the County cannot outright deny CEMEX's application for a surface mining permit.

121. With regard to paragraph 121, the City asserts that the Planning Staff's report speaks for itself. The City denies, however, all allegations set forth in paragraph 121 insofar as they assert that the project alternatives and mitigation measures proposed by the community were improper, in conflict with federal law, or in violation of CEMEX's rights.

122. With regard to paragraph 122, the City admits that the Planning Staff's report did adopt a number of the mitigation measures proposed by the community.

123. The allegations set forth in paragraph 123 are denied.

124. With regard to paragraph 124, the City asserts that

the Planning Staff's report speaks for itself. The City denies, however, all allegations set forth in paragraph 124 insofar as they assert that the conditions recommended for approval by the Planning Staff were improper, illegal, in conflict with federal law, or violative of CEMEX's rights.

125. With regard to paragraph 125, the City admits that the BLM issued a letter to the County expressing concerns over the mitigation measures recommended by the Planning Staff.

126. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 126.

127. With regard to paragraph 127, the City admits that the November 27, 2001 hearing was continued. The City denies, however, all allegations set forth in paragraph 127 insofar as they assert that the continuance of the hearing was improper or illegal.

128. With regard to paragraph 128, the City asserts that the statements made by members of the LABOS cited therein speak for themselves.

129. With regard to paragraph 129, the City asserts that the actual statements made by County officials speak for themselves. The City denies, however, all allegations set forth in paragraph 129 insofar as they assert that the statements made by County officials were incorrect, improper, or illegal.

130. With regard to paragraph 130, the City admits that the LABOS continued the November 27, 2001 hearing until January 22, 2002. The City is without sufficient information in which to form a belief as to the accuracy of all other

*allegations set forth in paragraph 130.*

131. With regard to paragraph 131, the City admits that Supervisor Antonovich questioned the adequacy of the evaluation of the traffic impacts of the Soledad Canyon Project.

132. With regard to paragraph 132, the City admits that Supervisor Antonovich questioned the adequacy of the standard used to determine the traffic impacts of the Soledad Canyon Project.

133. With regard to paragraph 133, the City asserts that statements by County Counsel speak for themselves. The City denies, however, all allegations set forth in paragraph 133 insofar as they assert that the position taken by County Counsel was proper and legally correct.

134. With regard to paragraph 134, the City admits that the January 22, 2002 hearing was continued to February 26, 2002. The City is without sufficient information in which to form a belief as to the accuracy of all other allegations set forth in paragraph 134.

135. With regard to paragraph 135, the City asserts that the official minutes cited therein speak for themselves.

136. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 136.

137. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 137. The City denies, however, all allegations set forth in paragraph 137 insofar as they assert that the

Department of Public Works' ("DPW") concern over traffic impacts is the result of political pressure from the Fifth District and Supervisor Antonovich.

138. With regard to paragraph 138, the City admits that the DPW has now expressed concerns regarding the Soledad Canyon Project's impact on traffic. The City denies, however, all allegations set forth in paragraph 138 insofar as they assert that the DPW has suddenly, and inexplicably, changed its position, or that the DPW's position is the result of undue political pressure.

139. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 139.

140. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 140.

141. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 141.

142. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 142.

143. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 143.

144. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 144.

145. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 145.

146. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 146.

147. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 147.

148. The City denies the allegations of paragraph 148 insofar as they assert that issues raised concerning the Project's traffic impacts were merely a pretext for delay or that the County of Los Angeles abused the environmental review process in an effort to delay the Project. The City further denies allegations that the County had established a "pattern of conduct" against CEMEX. The City asserts that the article cited speaks for itself.

149. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 149.

150. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 150.

151. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 151.

152. The City denies the allegations implying that traffic issues were resolved by the DPW's February 21, 2002 report.

AS to the remaining allegations in paragraph 152, the City is without sufficient information in which to form a belief as to the accuracy of the allegations.

153. The City denies the allegation in paragraph 153 that the DPW's February Planning Staff Report reflected a "last minute change of position on traffic by DPW". The City asserts that the Report speaks for itself. The City denies the allegation that CEMEX is entitled to damages for alleged delays during the environmental review process. The City asserts that LABOS reasons for denying CEMEX' surface mining permit were set forth in the April 18, 2002 Findings. As to the remaining allegations, the City is without sufficient information in which to form a belief as to the accuracy of the allegations.

154. The City asserts that the Report referred to in paragraph 154 speaks for itself. The City asserts that a traffic impact study should have been prepared to determine the Project's impact on the Antelope Valley Freeway and on Interstate 5, pursuant to Caltrans Guide for the Preparation of Traffic Impact Studies. The City asserts that rail-haul is needed to mitigate traffic impacts of the Project. The City at this time is without sufficient information in which to form a belief as to the accuracy of the remaining allegations set forth in paragraph 154.

155. The City asserts that the documents referenced in paragraph 155 speak for themselves. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 155.

156. The City is without sufficient information in which to form a belief as to the accuracy of the allegations set forth in paragraph 156. The City asserts that the referenced "Press

Release" speaks for itself.

157. The City asserts that CEMEX' February 25, 2002 letter referenced in paragraph 157 speaks for itself. The City denies the allegations in paragraph 157 to the extent CEMEX' claims that the County's environmental review process was improper or deficient. The City is without sufficient information in which to form a belief as to the accuracy of the other allegations set forth in paragraph 157.

158. The City admits that the LABOS held a hearing on February 26, 2002 and at the conclusion of the hearing voted its intent to deny CEMEX' surface mining permit application. The City asserts that CEMEX was provided sufficient time to show a 30 minute video tape and to present evidence or argument concerning traffic impact issues. The City admits that Rick Putnum was the only Project opponent that made a presentation at the hearing. The City denies all allegations that the hearing's procedures were improper or illegal.

159. The City denies the allegations that the LABOS decided to deny the Project prior to the February 26, 2002 hearing or that the length of presentations or the number of speakers is evidences a "pre-decisional" position.

160. The City admits that it produced documents referencing TMC meetings. The City denies the allegations that the LABOS decided to deny the Project prior to the February 26, 2002 hearing or that documents referenced in paragraph 160 evidence a "pre-decisional" position. The City denies the allegations that the City representatives' attendance at meetings concerning the Project were improper or illegal. Due to the vague and ambiguous nature of these allegations, the City lacks sufficient information with which to inform a belief as to the accuracy of the other allegations.

161. The City denies the allegations that the LABOS decided to deny the Project prior to the February 26, 2002 hearing. The City lacks sufficient information with which to inform a belief as to the accuracy of the other allegations in paragraph 161.

162. The City admits that CEMEX was granted approximately thirty (30) minutes to make its presentation to the board. The City asserts that CEMEX was provided additional time to respond to comments and concerns raised by the Board. The City asserts that statements made by Board Chairman Zev Yaroslavsky and referenced in paragraph 162, pertain to CEMEX' refusal to mitigate significant traffic impacts of the Project. The City asserts that CEMEX' complaint seeks approval of the Project, without regard to mitigation measure CEMEX agreed to but are not included in the Final Environmental Impact Statement.

163. The City admits that CEMEX showed a videotape for approximately 30 minutes at the February 26, 2002 hearing. The City denies the allegations that the videotape is evidence that the Project will not have significant impacts on Soledad Canyon Road. The City denies the allegations that the County Department of Public Works position on the traffic analysis was either improper or unreasonable. The City asserts that a thirty (30) minute videotape is not a proper analysis of the traffic impacts of the Project on Soledad Canyon Road.

164. The City admits that at the conclusion of the February 26, 2002 hearing CEMEX agreed to some of the mitigation measures identified in the February Department of Public Work's Report. The City asserts that CEMEX's offer did not address all of the concerns relating to Project traffic impacts raised by DPW and the City. The City asserts that at

the hearing CEMEX refused to revise the Environmental Impact Report ("EIR") and re-circulate the revised EIR. The City asserts that CEMEX was put on notice for weeks regarding the DPW's traffic issues but refused to provide any further analysis to DPW or agree to any reasonable mitigation measures.

165. The City denies the allegations that CEMEX was not provided sufficient time to address traffic issues raised by the County DPW. The City asserts that traffic issues have been a concern throughout the review process. The City denies the allegations that the Project has no significant impacts to the 14 Antelope Valley Freeway or that there is no need for rail-haul.

166. The City admits that LABOS voted its intent to deny the surface mining permit application on February 26, 2002. The City asserts that the LABOS reasons for the denial are set forth in the LABOS April 18, 2002 Findings. The City asserts that the motion on the intent to deny speaks for itself. The City denies all allegations that the vote on intent to deny was improper of illegal.

167. The City asserts that the record of the February 26, 2002 hearing speaks for itself. The City denies the allegations set forth in the parenthetical comments by CEMEX. The City asserts that CEMEX refused to revise and re-circulate the EIR to address the traffic issues raised by County DPW.

168. The City admits that the LABOS voted its intent to deny and instructed County Counsel to prepare findings for denial, following an approximately hour long hearing on the issue. The City denies the other allegations in paragraph 168.

169. The City admits the allegations in paragraph 169.

170. The City admits the allegations in paragraph 170. The City asserts that on April 18, 2002 the LABOS issued its findings.

171. The City admits the allegations in paragraph 171.

172. The City asserts that the supplemental agenda referred to in paragraph 172 speaks for itself.

173. The City lacks sufficient information and belief to either admit or deny the allegations set forth in paragraph 173.

174. The City asserts that CEMEX's April 22 letter speaks for itself. The City denies the merits of the letter's contents.

175. The City asserts that the transcript of the February 26, 2002 County Board hearing and the findings referred to in paragraph 175 speak for themselves. The City denies all allegations concerning the meaning or impact of the Board's Statements and Findings.

176. The City denies all allegations insofar as they assert that the County's findings and denial of the Project were in any way improper, illegal or unsupportable.

177. The allegations set forth in paragraph 177 are denied.

178. The City denies all allegations insofar as they assert that the County Board's adoption of the findings was in any manner improper or illegal.

179. The City asserts that the minutes of the County Board's April 23, 2002 hearing speak for themselves. The City admits the County unanimously denied surface mining

permit No. 91-165-(5). The City denies CEMEX's characterization of the April 23, 2002 hearing or that the County's action was in any way improper or illegal.

180. The allegations set forth in paragraph 180 are denied.

181. The allegations set forth in paragraph 181 are denied.

182. With regard to paragraph 182, the City asserts that the article cited therein speaks for itself and denies the article's accuracy. The City denies, however, all allegations set forth in paragraph 182 insofar as they assert that the City has an improper relationship with County officials, or has acted in an improper or illegal manner to unduly influence the County.

183. With regard to paragraph 183, the City asserts that the IBLA has issued a decision affirming, in part, and denying, modifying, in part, the BLM's ROD. The City denies, however, all allegations set forth in paragraph 183 insofar as they assert that the IBLA's decision was proper or legally correct.

184. The allegations set forth in paragraph 184 are denied.

**FIRST CLAIM FOR RELIEF**

185. With regard to paragraph 185, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 185.

186. The allegations set forth in paragraph 186 are denied.

187. With regard to paragraph 187, the City asserts that CEMEX has submitted a mining and reclamation plan to the BLM and that on August 1, 2000, the BLM approved the plan

through the issuance of a ROD, and on January 8, 2002, the IBLA affirmed, in part, and modified, in part, the BLM's decision. All other allegations set forth in paragraph 187 are denied.

188. With regard to paragraph 188, the City admits that the County has not approved CEMEX's application for a surface mining permit. The City denies, however, all allegations set forth in paragraph 188 insofar as they assert that the County's refusal, up to this point, to approve CEMEX's application is improper, illegal, or in excess of the County's authority.

189. The allegations set forth in paragraph 189 are denied.

190. With regard to paragraph 190, the City admits that the Planning Commission denied CEMEX's application for a surface mining permit. The City denies, however, all allegations set forth in paragraph 190 insofar as they assert that the Planning Commission's denial was improper, illegal, or in excess of its authority.

191. With regard to paragraph 191, the City admits that the LABOS has not approved CEMEX's application for a surface mining permit. The City denies, however, all allegations set forth in paragraph 191 insofar as they assert that the LABOS' action with regard to CEMEX's permit application were improper, illegal, or in excess of its authority.

192. The allegations set forth in paragraph 192, insofar as they assert that the LABOS has acted improperly, illegally, or in excess of its authority with regard to CEMEX's permit application, are denied.

193. The allegations set forth in paragraph 193, insofar as

they assert that the LABOS has acted improperly, illegally, or in excess of its authority with regard to CEMEX's permit application, are denied.

194. The allegations set forth in paragraph 194, insofar as they assert that the City has acted improperly or illegally with regard to CEMEX's permit application, are denied.

195. The allegations set forth in paragraph 195, insofar as they assert that the LABOS has acted improperly, illegally, or in excess of its authority with regard to CEMEX's permit application, are denied.

196. The allegations set forth in paragraph 196, insofar as they assert that the LABOS has acted improperly, illegally, or in excess of its authority with regard to CEMEX's permit application, are denied.

197. The allegations set forth in paragraph 197 are denied.

198. The allegations set forth in paragraph 198 are denied.

199. The allegations set forth in paragraph 199 are denied.

200. With regard to paragraph 200, the City requests that CEMEX be denied all relief requested therein.

**SECOND CLAIM FOR RELIEF**

201. With regard to paragraph 201, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 200.

202. The allegations set forth in paragraph 202, insofar as they assert that the decisions made by the BLM regarding

determination of alternatives and quantities to be mined have the force of federal law, are denied. The City denies all other allegations set forth in paragraph 202 insofar as they assert that federal regulations preclude a permittee from deviating from an approved plan.

203. The allegations set forth in paragraph 203, insofar as they assert that the conditions imposed, or recommended to be imposed, by the County are improper, illegal, or in conflict with federal law, are denied.

204. The allegations set forth in paragraph 204, insofar as they assert that the LABOS has acted improperly, illegally, or in excess of its authority with regard to CEMEX's permit application, are denied.

205. The allegations set forth in paragraph 205 are denied.

206. The allegations set forth in paragraph 206 are denied.

207. With regard to paragraph 207, the City requests that CEMEX be denied all relief requested therein.

**THIRD CLAIM FOR RELIEF**

208. With regard to paragraph 208, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 207.

209. With regard to paragraph 209, the City asserts that the Due Process Clause of the Fourteenth Amendment speaks for itself.

210. With regard to paragraph 210, the City asserts that 42 U.S.C. § 1983 speaks for itself.

211. The allegations set forth in paragraph 211 are denied.

212. The allegations set forth in paragraph 212 are denied.

213. The allegations set forth in paragraph 213 are denied.

214. The allegations set forth in paragraph 214 are denied.

215. The allegations set forth in paragraph 215 are denied.

216. The allegations set forth in paragraph 216, insofar as they assert that the LABOS has acted improperly, illegally, or in excess of its authority with regard to CEMEX's permit application, are denied. The City asserts that the reasons for denial of the surface mining permit are set forth in the LABOS April 18, 2002 Findings.

217. The allegations set forth in paragraph 217 are denied.

218. The allegations set forth in paragraph 218, insofar as they assert that the LABOS has acted improperly, illegally, or in excess of its authority with regard to CEMEX's permit application, are denied. The City asserts that the reasons for denial of the surface mining permit are set forth in the LABOS April 18, 2002 Findings.

219. The allegations set forth in paragraph 219 are denied.

220. The City lacks sufficient information to form a belief as to the allegations in paragraph 220.

221. The allegations set forth in paragraph 221 are denied.

222. With regard to paragraph 222, the City requests that CEMEX be denied all relief requested therein.

**FOURTH CLAIM FOR RELIEF**

223. With regard to paragraph 223, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 222.

224. With regard to paragraph 224, the City asserts that the Due Process Clause of the Fourteenth Amendment speaks for itself.

225. With regard to paragraph 225, the City asserts that 42 U.S.C. § 1983 speaks for itself.

226. The allegations set forth in paragraph 226 are denied.

227. The allegations set forth in paragraph 227 are denied.

228. The allegations set forth in paragraph 228 are denied.

229. The allegations set forth in paragraph 229 are denied.

230. The allegations set forth in paragraph 230 are denied.

231. The allegations set forth in paragraph 231 are denied.

232. The allegations set forth in paragraph 232 are denied.

233. The City is without sufficient information to form a belief concerning the allegations in paragraph 233.

234. The City is without sufficient information to form a belief concerning the allegations in paragraph 234.

235. With regard to paragraph 235, the City requests that CEMEX be denied all relief requested therein.

**FIFTH CLAIM FOR RELIEF**

236. With regard to paragraph 236, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 235.

237. With regard to paragraph 237, the City asserts that the Equal Protection Clause of the Fourteenth Amendment speaks for itself.

238. With regard to paragraph 238, the City asserts that 42 U.S.C. § 1983 speaks for itself.

239. The allegations set forth in paragraph 239 are denied.

240. The allegations set forth in paragraph 240 are denied.

241. The allegations set forth in paragraph 241 are denied.

242. The allegations set forth in paragraph 242 are denied.

243. The allegations set forth in paragraph 243 are denied.

244. The allegations set forth in paragraph 244 are denied.

245. With regard to paragraph 245, the City requests that CEMEX be denied all relief requested therein.

**SIXTH CLAIM FOR RELIEF**

246. With regard to paragraph 246, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 245.

247. With regard to paragraph 247, the City asserts that

the mandates under CEQA cited therein speak for themselves.

248. The City is without sufficient knowledge in which to form a belief as to the accuracy of the allegations set forth in paragraph 248.

249. With regard to paragraph 249, the City admits that the AEIDEIR was prepared and circulated in August 2000.

250. The allegations set forth in paragraph 250, insofar as they assert that two EIRs were presented to the LABOS during 2001 that were sufficient for certification, are denied.

251. The allegations set forth in paragraph 251, insofar as they assert that the EIR presented to the LABOS at the February 26, 2002 hearing was sufficient for certification, are denied. The City asserts that the reasons for denial of the surface mining permit are set forth in the LABOS April 18, 2002 Findings. The City denies the allegations in paragraph 251 to the extent they assert that the LABOS denial of the surface mining permit was improper, illegal or in excess of the LABOS' authority.

252. The allegations set forth in paragraph 252 are denied.

253. The allegations set forth in paragraph 253 are denied.

254. The allegations set forth in paragraph 254 are denied.

255. The allegations set forth in paragraph 255 are denied.

256. With regard to paragraph 256, the City requests that CEMEX be denied all relief requested therein.

## SEVENTH CLAIM FOR RELIEF

257. With regard to paragraph 257, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 256.

258. With regard to paragraph 258, the City asserts that the Takings Clause of the Fifth Amendment speaks for itself.

259. With regard to paragraph 259, the City asserts that 42 U.S.C. § 1983 speaks for itself.

260. The allegations set forth in paragraph 260 are denied.

261. The allegations set forth in paragraph 261 are denied.

262. The allegations set forth in paragraph 262 are denied.

263. The City is without sufficient information to form a belief concerning the accuracy of the allegations in paragraph 263.

264. The allegations set forth in paragraph 264 are denied.

265. The allegations set forth in paragraph 265 are denied.

266. With regard to paragraph 266, the City requests that CEMEX be denied all relief requested therein.

## EIGHTH CLAIM FOR RELIEF

(For Just Compensation-Inverse Condemnation, pursuant to the California Constitution, Art. I, § 19)

267. With regard to paragraph 267, the City refers to and incorporates by reference each and every answer contained in

paragraphs 1 through 266.

268. The City asserts that the reference section of the California Constitution speaks for itself.

269. The allegations set forth in paragraph 269 are denied.

270. The allegations set forth in paragraph 270 are denied.

271. The allegations set forth in paragraph 271 are denied.

272. The allegations set forth in paragraph 272 are denied.

273. The allegations set forth in paragraph 273 are denied.

274. The allegations set forth in paragraph 274 are denied.

275. The allegations set forth in paragraph 275 are denied.

276. With regard to paragraph 276, the City requests that CEMEX be denied all relief requested therein.

**NINTH CLAIM FOR RELIEF**

(For Writ of Administrative Mandates, Cal. Civ. Proc. Code § 1094.5 – To Reconsider Denial and Compel Approval of the Federally-Approved Project With Conditions Consistent With Federal Requirements)

277. With regard to paragraph 277, the City refers to and incorporates by reference each and every answer contained in paragraphs 1 through 276.

278. The City admits the County is the "lead agency" for issuance of a surface mining permit to CEMEX. The City denies the County's discretion is limited by Federal law as

denies the County's discretion is limited by Federal law as alleged by CEMEX.

279. The City admits the allegations set forth in paragraph 279.

280. The allegations set forth in paragraph 280 are denied.

281. The allegations set forth in paragraph 281 are denied.

282. The allegations set forth in paragraph 282 are denied.

283. The allegations set forth in paragraph 283 are denied.

284. The allegations set forth in paragraph 284 are denied.

285. With respect to paragraph 285, the City requests that CEMEX be denied all relief requested therein.

## GENERAL DENIAL

All allegations set forth in CEMEX's Complaint that were not specifically admitted or denied are hereby denied.

## AFFIRMATIVE DEFENSES

Based upon information and belief, the City asserts the following affirmative defenses:

## FIRST AFFIRMATIVE DEFENSE

CEMEX has failed to exhaust necessary administrative remedies. Accordingly, this Court does not have jurisdiction to hear CEMEX's claims.

**SECOND AFFIRMATIVE DEFENSE**

CEMEX's claims are not ripe for judicial review. Accordingly, this Court does not have jurisdiction to hear CEMEX's claims.

**THIRD AFFIRMATIVE DEFENSE**

This Court does not have jurisdiction to hear CEMEX's federal claims. Accordingly, supplemental jurisdiction under 28 U.S.C. § 1367 does not exist to hear CEMEX's state law claim under CEQA.

**FOURTH AFFIRMATIVE DEFENSE**

CEMEX has failed to give the requisite 60-day notice of its intent to bring a claim for damages against the County.

**FIFTH AFFIRMATIVE DEFENSE**

CEMEX fails to state a claim for which relief can be granted.

**SIXTH AFFIRMATIVE DEFENSE**

The Doctrine of Unclean Hands bars CEMEX from obtaining the equitable relief sought in its Complaint.

**SEVENTH AFFIRMATIVE DEFENSE**

The Materials Act of 1947 and BLM regulations do no prevent the County from imposing additional environmental conditions upon CEMEX's application for a surface mining permit or outright denying CEMEX's permit application.

## EIGHTH AFFIRMATIVE DEFENSE

The relief sought violates the federal Administrative Procedure Act, the National Environmental Policy Act and Title 40 of the Code of Federal Regulations Parts 1505 and 1506.

## NINTH AFFIRMATIVE DEFENSE

The conditions imposed, or recommended to be imposed, upon CEMEX's permit application by the County do not prevent the federal government from disposing of sand and gravel on federal land and are not, therefore, in conflict, or inconsistent, with federal law.

## TENTH AFFIRMATIVE DEFENSE

All actions taken by the City and the County are protected actions pursuant to authorized processes under CEQA and SMARA.

## ELEVENTH AFFIRMATIVE DEFENSE

Any and all delays, if any, have been caused by CEMEX's conduct in the processing of CEMEX's application for a surface mining permit.

## TWELFTH AFFIRMATIVE DEFENSE

All delays and/or continuances in the processing of CEMEX's application for a surface mining permit were the result of legitimate needs to further evaluate the Soledad Canyon Project's impact on the environment.

**THIRTEENTH AFFIRMATIVE DEFENSE**

CEMEX does not have a protectable property interest in its federal contracts or the ROD within the meaning of the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment, or within the meaning of the Takings Clause of the Fifth Amendment.

**FOURTEENTH AFFIRMATIVE DEFENSE**

All conditions imposed, or recommended to be imposed, by the County on CEMEX's application for a surface mining permit are rationally related to a legitimate governmental interest.

**FIFTEENTH AFFIRMATIVE DEFENSE**

The Planning Commission's decision to deny CEMEX's application for a surface mining permit had a rational basis relating to a legitimate governmental purpose.

**SIXTEENTH AFFIRMATIVE DEFENSE**

The Soledad Canyon Project is not similarly situated to other mining operations in the area within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

The delays and continuances during the CEQA review process, if any, were the result of actions taken by CEMEX. The one-year mandate under CEQA is not, therefore, applicable to CEMEX's application for a surface mining permit.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

CEMEX appealed the Planning Commission's denial of its permit application. The Planning Commission's denial constitutes action on the part of the County within the meaning of CEQA. The County has, therefore, acted within the one-year period in compliance with CEQA.

**NINETEENTH AFFIRMATIVE DEFENSE**

The County has not denied CEMEX all beneficial use of its property within the meaning of the Takings Clause of the Fifth Amendment.

**TWENTIETH AFFIRMATIVE DEFENSE**

CEMEX has not alleged, and the County has not engaged in, any conduct that warrants an award of attorney's fees and costs to CEMEX.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

The actions of the County in processing CEMEX's applications are expressly authorized and mandated by the Federal contracts and the ROD.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

The Court lacks subject matter jurisdiction to hear this case.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

The Court must abstain from hearing this case under the Younger abstention doctrine or other applicable authority.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

The requested relief is an unlawful abdication of the County's police powers as guaranteed by Article 11, §§ 4 and 11 of the California Constitution, and other applicable laws and regulations.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

The requested relief violates the separation of powers doctrine in violation of the United States Constitution and Article 3, § 3 of the California Constitution.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

The requested relief violates the City of Santa Clarita's right of petition as guaranteed by the First Amendment to the United States Constitution and under Article 1 § 3 of the California Constitution.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

The requested relief violates the City's right of consultation under Public Resources Code § 21153 and violates the public review provisions of CEQA.

**TWENTY-EIGHT AFFIRMATIVE DEFENSE**

The relief sought violates public policy.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

The relief sought violates property rights of the City which is the fee owner of the land on which the proposed mining project is located.

## PRAYER FOR RELIEF

WHEREAS, the City prays for judgment against CEMEX as follows:

1. That CEMEX take nothing by its Complaint;

2. For attorney's fees and costs associated with this action; and

3. For such other relief as the Court deems just and proper.

DATED: March 8, 2004

RESPECTFULLY SUBMITTED,

BURKE, WILLIAMS & SORENSEN, LLP
By: /s/ Carl K. Newton
Carl K. Newton, City Attorney
City of Santa Clarita
Deborah C. Prosser
Geralyn L. Skapik
Timothy H. Irons
Attorneys for
CITY OF SANTA CLARITA

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I caused a true and correct copy of ANSWER OF THE CITY OF SANTA CLARITA TO SECOND AMENDED COMPLAINT OF CEMEX to be served via regular mail this 8th day of March, 2004, to the following:

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# APPENDIX H

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FILING FEE EXEMPT
GOV'T CODE § 6103

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CEMEX, INC., a Louisiana Corporation,
Plaintiff,
v.
COUNTY OF LOS ANGELES, and
DOES 1 THROUGH 10, INCLUSIVE
Defendants.

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UNITED STATES OF AMERICA,
Plaintiff-in-Intervention.

---

City of Santa Clarita,
Defendant-in-Intervention.

---

Case No. 0200747 DT (FMOx)

Judge Dickran Tevrizian
Courtroom 880

**CITY OF SANTA CLARITA'S NOTICE OF *MOTION AND MOTION FOR SUMMARY* JUDGMENT/ADJUDICATION**

**[STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW; DECLARATION OF DEBORAH PROSSER; DECLARATION OF TIMOTHY IRONS; REQUEST FOR JUDICIAL NOTICE; AND PROPOSED ORDER FILED CONCURRENTLY]**

Date: April 26, 2004
Time: 10:00 a.m.
Dept: 880

Complaint Filed: 01/25/02

First Amended
Complaint Filed: 04/11/02

Second Amended
Complaint Filed: 05/09/02

Trial Date: None set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 26, 2004, at 10:00 a.m. in Courtroom 800 in the above-entitled Court, located at the Roybal Center & Federal Building, 255 East Temple Street, Los Angeles, California, City of Santa Clarita ("City"), Defendant-in-intervention, will move the Court for Summary Judgment, or in the alternative Summary Adjudication, ("Motion") pursuant to the Court's November 20, 2003

scheduling order setting April 26, 2004 as the deadline to hear motions for summary judgment. This Motion is brought pursuant to Federal Rule of Civil Procedure 56 on the following grounds:

(1) Based on the undisputed facts, Plaintiffs', CEMEX, Inc. ("CEMEX") and United States (collectively "Plaintiffs"), federal preemption claims fail as a matter of law [CEMEX's First and Second Claims for Relief; United States' First, Second and Third Claims for Relief],

(2) CEMEX's Procedural Due Process and Takings claims are premature and fail as a matter of law [CEMEX's Third and Seventh Claims for Relief][1] ,

(3) CEMEX's Equal Protection claim against the County of Los Angeles ("County") fails as a matter of law [CEMEX's Fifth Claim for Relief],

(4) If Plaintiff's federal claims are dismissed, the court lacks jurisdiction to hear the pendant state claims [CEMEX's Sixth, Eighth and Ninth Claims for Relief], and

(5) The application of the Younger Abstention Doctrine requires dismissal of all claims.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on March 12, 2004.

This Motion is based on this Notice of Motion and Motion, the memorandum of points and authorities, attached,

---

[1] CEMEX's Fourth Claim for Relief for violation of Substantive Due Process was dismissed pursuant to the Court's July 29, 2002 Order.

the Statement of Uncontroverted Facts and Conclusions of Law in support of the Motion, the Declaration of Timothy H. Irons, and the City's Request for Judicial Notice, all filed concurrently, the pleadings and papers filed herein, the County's Administrative Record lodged with the Court, any Reply papers filed by the City and all matters that may be raised at the hearing on the Motion.

DATED: April 2nd, 2004

RESPECTFULLY SUBMITTED,

BURKE, WILLIAMS & SORENSEN, LLP
By: /s/
Carl K. Newton, City Attorney
City of Santa Clarita
Deborah C. Prosser
Geralyn L. Skapik
Timothy H. Irons
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TABLE OF CONTENTS

Page

I. SUMMARY OF ARGUMENTS ..... 5

II. FACTUAL BACKGROUND ..... 17

III. LEGAL ARGUMENT ..... 20

A. The Undisputed Facts Establish That Plaintiffs Federal Preemption Claims Fail as a Matter of Law ..... 20

1. Plaintiffs' Preemption Claims Fail as a Matter of Law Because Federal Administrative Procedures Act Remedies Have Not Been Exhausted ..... 21

2. Congress Has Not Expressed Its Intent to Occupy the Field of Surface Mining ..... 22

3. Federal Materials Act of 1947 Does Not Conflict With CEQA or SMARA ..... 25

4. The Federal Decisions Do Not Preempt CEQA or SMARA But Rather Mandate Compliance ..... 26

5. The Federal Clean Air Act and Clean Water Act Mandate Compliance With CEQA ..... 28

6. The County Approval Process, County Conditions and County Denial Are Not Preempted ..... 30

a. The County Review Process and Denial Are Not Preempted ..... 30

b. The County's "Consideration" of Conditions Is Not Preempted ..... 33

B. CEMEX's Takings Claim and Claim That It Has Been Deprived of Property Without Due Process Are Premature And Fail as a Matter of Law ..... 34

1. Fifth Amendment Takings Claim ..... 34

2. CEMEX's Due Process Claim ..... 36

C. CEMEX's Claim That It Has Been Denied Equal Protection Fails as a Matter of Law .... 37

D. Dismissal of Plaintiffs' Federal Claims Requires Dismissal of CEMEX's Pendant State Claims ..... 39

E. Pursuant to the "*Younger*" Abstention Doctrine the District Court Must Abstain From Taking Jurisdiction and Dismiss the Action ..... 39

1. The Relief Sought by CEMEX Interfered With State Proceedings ..... 41

2. The State Proceedings are Ongoing ..... 41

3. The State Has An Important Interest in the SMARA and CEQA Process ..... 42

4. CEMEX Can Raise its Federal Claims in the State Proceedings ..... 43

IV. CONCLUSION ..... 44

## TABLE OF AUTHORITIES

### Federal Cases

**Page**

*Arroyo Vista Partners v. County of Santa Barbara,*
732 F. Supp. 1046 ..... 37, 38

*Barcellos and Wolfsen, Inc. v. Westlands Water District,*
899 F.2d 814 (9th Cir. 1990) ..... 36

*Beltran v. California,*
871 F.2d 777 (9th Cir.1988) ..... 42, 43

*Bennett v. Spear,*
520 U.S. 154, 117 S. Ct. 1154 (1997) ..... 21

*Brady v. Town of Colchester,*
863 F.2d 205 (2nd Cir. 1988) ..... 38

*California Coastal Commission v. Granite Rock Co.,*
480 U.S. 572, 107 S. Ct. 1419,
94 L. Ed. 2d 577 (1987) ..... 22, 24-26

*California Department of Health Services v. Babbitt,*
46 F. Supp. 2d 13 (D.D.C. 1999) ..... 21

*Cassettari v. County of Nevada,*
824 F.2d 735 (9th Cir. 1987) ..... 34, 37

*Celotex Corp. v. Catrett,*
477 U.S. 317, 106 S. Ct. 2548,
91 L. Ed. 2d 265 (1986) ..... 20

*Citizens to Preserve Overton Park, Inc. v. Volpe,*
401 U.S. 402, 91 S. Ct. 814,
28 L. Ed. 2d 136 (1971) ..... 32

*City of Chicago v. International College of Surgeons,*
522 U.S. 156,118 S. Ct. 523 (1997) ..... 35

*Clause Millet v. Campbell County,*
945 F.2d 348 (10th Cir. 1991) ..... 37

*Communications Telesystems v. California Public,*
14 F. Supp. 2d 1165 (N.D. Cal.1998) ..... 40

*Communities for a Better Environment v.*
*Cenco Refining Co.,*
180 F. Supp. 2d 1062 (C.D. Cal. 2001) ..... 28, 29

*Environmental Defense Center, Inc. v.*
*United States EPA,*
344 F.3d 832 (9th Cir. 2003) ..... 29

*Firemans Fund Insurance Co. v. City of Lodi,*
302 F.3d 928 (9th Cir. 2002) ..... 22

*First English Evangelical Lutheran Church v.*
*County of Los Angeles,*
482 U.S. 304, 107 S. Ct. 2378,
96 L. Ed. 2d 250 (1987) ..... 35

*Fresh International Corp. v. Agriculture*
*Labor Relations Board,*
805 F.2d at 1356 ..... 40-42

*Friends of the Earth v. United States Navy,*
841 F.2d 927 ..... 30

*Grand Metropolitan PLC v. Pillsbury Co.*,
702 F. Supp. 236 (D. Ariz.1988) ..... 40, 43

*Green v. City of Tucson*,
255 F.3d 1086 (9th Cir. 2001) ..... 40, 41

*Kim-Stan, Inc. v. Department of Waste Management*,
732 F. Supp.646 (E.D.Va.1990) ..... 43

*Kleppe v. New Mexico*,
426 U.S. 529, 96 S. Ct. 2285,
49 L. Ed. 2d 34 (1976) ..... 22

*Lake Nacimiento Ranch Co. v. San Luis Obispo County*,
841 F.2d 872 (9th Cir. 1987) ..... 37

*Lynce v. Mathis*,
519 U.S. 433, 117 S. Ct. 891,
137 L. Ed. 2d 63 (1997) ..... 35

*Madera Irrigation District v. Hancock*,
985 F.2d 1397 (9th Cir. 1992) ..... 36

*McDonald v. Metropolitan-North Commuter Railroad Division*,
565 F. Supp. 37 (S.D.N.Y.1983) ..... 43

*Middlesex County Ethics Committee v. Garden State Bar Association*,
457 U.S. 423, 102 S. Ct. 2515,
73 L. Ed. 2d 116 (1982) ..... 40

*Mineral Policy Center v. Norton*,
292 F. Supp. 2d 30 (2003) ..... 20

*Mission Oaks Mobile Home Park v. City of Hollister,*
768 F. Supp. at 1120 ..... 40

*Mission Oaks Mobile Home Park v. City of Hollister,*
788 F. Supp. 1117 (N.D.Cal.1992) ..... 39-40, 42-43

*New Orleans v. Dukes,*
427 U.S. 297, 96 S. Ct. 2513,
49 L. Ed. 2d 511 (1976) ..... 38

*Ohio Civil Rights Commission v.*
*Dayton Christian Schools, Inc.,*
477 U.S. 619, 106 S. Ct. 2718,
91 L. Ed. 2d 512 ..... 42, 43

*PUD NO. 1 v. Washington Department of Ecology,*
511 U.S. 700, 114 S. Ct. 1900,
128 L. Ed. 2d 716 (1994) ..... 29, 30

*Robertson v. Methow Valley Citizens Council,*
490 U.S. 332, 109 S. Ct. 1835,
104 L. Ed. 2d 351 (1989) ..... 26

*South Dakota Mining Association v. Lawrence County,*
977 F. Supp. 1396 (D.S.D. 1997) ..... 25

*United Mine Workers of America v. Gibbs,*
383 U.S. 715, 86 S. Ct. 1130,
16 L. Ed. 2d 218 (1996) ..... 39

*United States v. Consolidated Mines & Smelting Co.,*
455 F.2d 432 (9th Cir. 1971) ..... 21

*Wien Consolidated Airlines, Inc. v. C.I.R.,*
528 F.2d 735 (9th Cir. 1976) ..... 35

*Williams v. Red Bank Board of Education,*
662 F.2d 1008 (3d Cir.1981) ..... 43

*Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172,
105 S. Ct. 3108,
87 L. Ed. 2d 126 (1985) ..... 34

*Wisconsin Public Intervenor, et. al. v. Mortier,*
501 U.S. 597, 111 S. Ct. 2476,
115 L. Ed. 2d 532 (1991) ..... 22

*Younger v. Harris,*
401 U.S. 37, 91 S. Ct. 746,
27 L. Ed. 2d 669 (1971) ..... 39-42

**State Cases**

*Baldwin Park Redevelopment Agency v. Irving,*
156 Cal. App. 3d 428 (1984) ..... 34

*McMahan's of Santa Monica,*
146 Cal. App. 3d 683 (1983) ..... 34

*McQueen v. Board of Directors of Mid-Peninsula Regional Open Space District,*
202 Cal. App. 3d 1136,
249 Cal. Rptr. 439 (1988) ..... 18

**Federal Statutes**

43 C.F.R.
§ 4.21 (c) ..... 22
§ 3601.6 (d) ..... 23
§ 3809.3 ..... 24, 26
§ 3809.415(d) ..... 24

5 U.S.C. § 704 ..... 21

30 U.S.C. § 601 ..... 23

33 U.S.C.
§ 1251 ..... 28
§ 1313 ..... 28
§ 1341(a) ..... 29

42 U.S.C.
§ 1983 ..... 39
§ 4321 ..... 18

43 U.S.C.
§ 1701(a)(8) ..... 23
§ 1732(b) ..... 23, 28
§ 7401 ..... 28

65 F.R.
58892 ..... 23
58900 ..... 23
70008-9 ..... 24

Federal Rule of Civil Procedure
Rule 56 ..... 20
Rule 56 (c) ..... 20

**State Statutes**

14 Cal. Code of Regs.
§ 15021 ..... 26
§ 15042 ..... 32
§ 15091 ..... 26
§ 15381 ..... 28, 29

Cal. Code Civ. P.
§ 1235.170 ..... 34
§ 1245.260 ..... 34

Cal. Pub. Res. Code
§ 2710 ..... 16
§ 21000 ..... 15, 25
§ 21065 ..... 18
§ 21081 ..... 32

Cal. Water Code
§ 13000 ..... 29
§ 13160 ..... 28
§ 13200 ..... 29
§ 13201 ..... 29

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. SUMMARY OF ARGUMENTS

(1) There is no legal or factual basis supporting Plaintiffs' claims that federal mining law and a federal mining decision preempt state environmental laws and regulations designed to protect the public. It is undisputed that the federal decision to mine fifty six (56) million tons of sand and gravel in Soledad Canyon, California expressly conditions *federal* approval on the applicant's compliance with state laws and regulations. Statement of Uncontroverted Facts ("SUF") Nos. 1-7. The Bureau of Land Management ("BLM") expressly conditioned its Record of Decision ("ROD") on local review and approval, including compliance with the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 *et seq.* SUF Nos. 8-14. It is undisputed that the federal government signed a Memorandum of Understanding ("MOU") with the State of California acknowledging the applicability of state environmental laws to federal surface mining activities. SUF Nos. 15-16. These *federal* conditions are consistent with the purpose and intent of the federal Materials Act of 1947, which is to dispose of sand and gravel in a manner that is *not detrimental to the public's interest.*

At its heart, this case is not as much about the preemption of the local environmental regulation as it is about Plaintiffs asking the court to rescind these *federal decisions*, in violation of the federal Administrative Procedure Act ("APA"); as well as other federal law. CEQA does not mandate particular land uses but requires only that, however land is used, damage to the environment is kept within prescribed limits. The only "condition" the County Board of Supervisors imposed on CEMEX, Inc. ("CEMEX") was recirculation of the Project's Environmental Impact Report ("EIR"), to fully address the

Project's effect on traffic. This condition amounts to reasonable environmental regulation, not a land-use decision. Therefore, it is not preempted.

(2) CEMEX's Procedural Due Process and Takings claims are premature. Fifth Amendment Takings claims require a taking *without just compensation*. Where state law provides procedures to compensate for the deprivation, a Fifth Amendment Taking is not ripe until the state procedures have been exhausted. CEMEX has failed to exhaust available state procedures. Procedural Due Process claims alleging a deprivation of the same property rights are subsumed under the Takings claim and therefore must also satisfy the exhaustion requirement. As noted above, local review and approval is a condition precedent to CEMEX's right to the sand and gravel, pursuant to the express terms of the federal contracts. As such, CEMEX has not been deprived of any *vested* rights under the federal contracts.

(3) CEMEX's Equal Protection claim fails as a matter of law. To state an equal protection claim, CEMEX must charge the County of Los Angeles ("County") not only with deliberately acting against it, but also with singling it out for selective enforcement on an impermissible basis. There is no allegation that the County intentionally discriminated against CEMEX for constitutionally suspect motives. Moreover, the County's approval process and ultimate denial is rationally related to its legitimate authority under CEQA, the Surface Mining and Reclamation Act of 1975, Cal. Pub. Res. Code § 2710, *et seq.* ("SMARA"), the federal contracts, the ROD and federal law.

(4) CEMEX's state claims for inverse condemnation, traditional mandate and administrative mandamus are only properly before the Court as pendant state claims. If

Plaintiffs' federal claims are without merit, then the Court lacks pendant jurisdiction over the remaining state law claims.

(5) The *Younger* Abstention doctrine requires dismissal. Abstention is mandatory if: (a) at the time of the filing of the lawsuit the state proceedings are ongoing; (b) the proceedings implicate important state interests; and (c) the state proceedings provide an adequate opportunity to raise federal questions. CEMEX filed its lawsuit prior to a previously scheduled hearing on its appeal before the County Board of Supervisors. The state proceeding was ongoing at the time of filing the complaint, adequate opportunities to raise federal questions were available to CEMEX and compliance with state environmental laws is an important state interest.

## II. FACTUAL BACKGROUND

This lawsuit arises from CEMEX's ill-founded frustration with the County's administrative review of Surface Mining Permit Application Number 91-165(5) ("Permit"). The Permit is for the extraction of up to 69.2 million tons of material to produce and sell approximately fifty six (56) million tons of sand and gravel, in Soledad Canyon, California ("Project"). Consent Decree, Exhibit H, pg. 7, ¶ aa. The City has actively opposed the granting of the Permit for the Project, on the grounds that the Project, as proposed, will cause significant detrimental impacts to the City's air, water and land resources as well as to the health, safety and welfare of its citizens. See, City's Renewed Motion to Intervene filed May 28, 2002, docket numbers 40 to 43.

In 1990, the BLM contracted the sale of sand and gravel (the "Contracts") to Transmix Corporation, predecessor in interest to CEMEX. (CEMEX Second Amended Complaint ("SAC") 11:16-19). The sand and gravel contracts require

compliance with state and local rules and regulations.[2] Pursuant to a *force majeure* clause, the Contracts may be terminated if state and local rules, regulations and decisions prevent CEMEX, through no fault of its own, from mining. SUF Nos. 6 and 7. One of the contract conditions is the applicant's compliance with SMARA. SUF No. 5. Under SMARA, CEMEX is required to obtain a surface mining permit from the County. Thus, CEMEX is subject to two independent environmental schemes: federal review and approval under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA") and local review and approval under SMARA and the CEQA.[3]

In May of 1990 Transit Mixed Concrete ("TMC") (predecessor to CEMEX) submitted a proposed mining and reclamation plan for the Project to the BLM. SUF No. 18. The following year, TMC submitted its Permit application to the County. SUF No. 19. In 1995, TMC's consultant prepared a Screencheck EIR on the Project. SUF No. 20. On February 17, 1999 County released the Draft EIR for public review and comment. SUF No. 21. After conducting the CEQA review, the County Planning Commission denied the Permit application on February 16, 2000. SUF No. 22.

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[2] The Contracts expressly require compliance with the rules and regulations of the South Coast Air Quality Management District ("SCAQMD"), the rules and regulations of the State of California, Regional Water Quality Control Board ("SCWQCB") and with SMARA. SUF Nos. 4 and 5.

[3] Approval of a mining permit is a "project" subject to the requirements of CEQA. Public Resources Code § 21065; *McQueen v. Board of Directors of Mid-Peninsula Regional Open Space District*, 202 Cal. App. 3d 1136, 1143, 249 Cal. Rptr. 439 (1988) [The term 'project' is given a broad interpretation in order to maximize the protection of the environment].

Approximately six months later, on August 1, 2000, the BLM, issued its ROD, pursuant to NEPA. SUF No. 23. Each of these decisions was appealed. SUF Nos. 24 and 25. On January 8, 2002, the Interior Board of Land Appeals ("IBLA") issued its ruling affirming the ROD. SUF No. 26. On February 26, 2002 -- after CEMEX filed the instant lawsuit -- the County Board held a hearing on CEMEX's Permit and voted its intent to deny the appeal. SUF Nos. 27-29.

At the February 26, 2002 hearing on CEMEX's appeal, Supervisor Molina sought to clarify whether or not CEMEX was willing recirculate the EIR for public review and comment, due to a dispute over traffic impacts. SUF Nos. 28 and 29; SAC, 78:19-79: 6. CEMEX, however, refused to recirculate the EIR. SUF No. 28. Based on CEMEX's refusal to subject the EIR to additional public review and comment, particularly with regard to the traffic analysis, and the fact that CEMEX filed suit against the County to preempt the County's environmental review, the County Board voted its intent to deny the Permit. SUF No. 29; SAC, 78:19-79: 6. On April 23, 2002 the County Board issued findings in support of the denial. SUF No. 30.

The City actively sought to intervene shortly after the filing of the lawsuit. City was twice denied intervention status. On February 24, 2004, the Ninth Circuit Court of Appeals overturned the second denial. One day prior to the Ninth Circuit's decision, the original parties filed a Motion for Entry of Consent Decree. The Proposed Consent Decree finds that federal law preempts the County denial of the Permit and that any further application of CEQA or SMARA is preempted, even if significant new information was added to the Final EIR. Consent Decree, 53: 20-28. Despite the County's previously stated position that it must recirculate the

Final EIR prior to certification, the proposed Consent Decree finds that any further recirculation or review is preempted.

## III. LEGAL ARGUMENT

A motion for summary judgment is appropriate where there is no genuine issue of material fact and where the moving party is entitled to a judgment as a matter of law. *See*, Federal Rule of Civil Procedure, Rule 56 (c). A motion for summary judgment "pierces" the pleadings and puts the opponent to the test of affirmatively coming forward with sufficient evidence for its claims or defenses to create a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed. 2d 265 (1986). Because this court's review is based upon the County's administrative record, summary judgment is especially appropriate. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 36 (2003).

### A. The Undisputed Facts Establish That Plaintiffs Federal Preemption Claims Fail As A Matter Of Law

CEMEX's First and Second Claims for Relief and the United States' First, Second and Third Claims for Relief each allege that federal law and the federal decision to mine in Soledad Canyon preempt local environmental review pursuant to CEQA and SMARA. These claims are without merit for the following reasons: (1) Plaintiffs have failed to exhaust administrative remedies under the federal Administrative Procedures Act, (2) Congress has not expressed an intent to occupy the field of surface mining, (3) the Federal Materials Act of 1947 does not conflict with CEQA or SMARA, (4) the MOU, federal contracts and ROD mandate compliance with CEQA and SMARA, (5) the Federal Clean Air Act and Clean

Water Act mandate compliance with CEQA and (6) the County approval process, the conditions the County considered and the County's denial all concern environmental regulation, not land-use decisions.

### 1. Plaintiffs' Preemption Claims Fail As a Matter Of Law Because Federal Administrative Procedures Act Remedies Have Not Been Exhausted

The Plaintiffs seek relief to preempt CEQA and SMARA, effectively rescinds the Federal Contracts and the ROD in violation of the federal Administrative Procedures Act ("APA"). If the BLM believes that compliance with CEQA is no longer advisable or occurs only in a truncated or advisory fashion, its first duty under the APA is to rescind the ROD. Such an action is subject to notice and public comment requirements and judicial review as a "final agency action." See, 5 U.S.C. § 704; *California Dep't of Health Servs. v. Babbitt*, 46 F. Supp. 2d 13, 27 (D.D.C. 1999) [the decision rescinding Secretary Lujan's ROD was a final agency action]; *Bennett v. Spear*, 520 U.S. 154, 177, 117 S. Ct. 1154, 1168 (1997). Plaintiffs' preemption arguments are a disguised attempt to overturn the ROD without satisfying the notice and procedural requirements of the APA.

Likewise, if CEMEX believed that compliance with CEQA was preempted, CEMEX was required to administratively appeal the ROD's CEQA determination. Agencies may require by rule that an appeal be taken to a superior agency authority before judicial review may be sought. *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 440 (9th Cir. 1971). Here, the Department of Interior requires by rule that appeals be taken to the IBLA

before being subject to judicial review. 43 Code of Federal Regulations § 4.21 (c) CEMEX's failure to pursue the required appeal relieves this court of jurisdiction.

### 2. Congress Has Not Expressed Its Intent to Occupy the Field of Surface Mining

While Congressional power over federal lands is absolute, "States are free to enforce their criminal and civil laws on federal land so long as those laws do not conflict with federal law." *Kleppe v. New Mexico*, 426 U.S. 529, 543, 96 S.Ct. 2285, 2293, 49 L.Ed. 2d 34 (1976). "State law can be preempted [by federal law] in either of two general ways." *California Coastal Commission v. Granite Rock Co.("Granite Rock")*, 480 U.S. 572, 581, 107 S.Ct. 1419, 1425, 94 L.Ed. 2d 577 (1987). "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Id.* Congress' intent to supplant state authority in a particular field may be expressed in the terms of the statute, or can be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the [s]tates to supplement it." *Wisconsin Public Intervenor, et. al. v. Mortier*, 501 U.S. 597, 605, 111 S.Ct. 2476, 2481, 115 L.Ed. 2d 532 (1991).

When considering preemption, the court must "start with the assumption that the historic police powers of the [s]tates were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, 501 U.S. at 605, 111 S. Ct. at 2482. "In the absence of a strong indication to the contrary, we adhere to the presumption," that Congress does not intend to "deny local communities throughout the National significant powers of self-protection." *Firemans Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 943 (9th Cir.

2002), (*quoting Wisconsin Public Intervenor v. Mortier*, 501 U.S. at 621).

The Materials Act of 1947, 30 U.S.C. § 601, *et seq* ("Act") controls disposal of federal sand and gravel. There is no express language in the Act evidencing any Congressional intent to supplant state and local authority over the environmental regulation of surface mining. To the contrary, there is language that shows an intent not to preempt. By enacting the Act, Congress gave the Secretary of the Interior the authority to dispose of sand and gravel deposits located on federal land. 30 U.S.C. § 601. This authority, however, is qualified. Under the Act, the Secretary cannot dispose of sand and gravel located on federal land if such disposal would be *detrimental to the public's interest. Id.* (emphasis added). Regulations promulgated under the Act provide that it is BLM's policy "to protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals;" 43 Code of Federal Regulations ("C.F.R.") § 3601.6 (d), 66 Federal Register ("F.R.") 58892, 58903 (2001). The commentary to the Final rule adopting these regulations specifically provides that "the rule does not preempt State law." (emphasis added) 66 FR 58892, 58900.

The Federal Land Policy and Management Act ("FLPMA") establishes standards for the BLM to regulate mining activities on public lands. FLPMA balances the need for domestic sources of minerals against the need to mitigate mining impacts to "protect the quality of scientific, scenic, historical, ecological, environmental, air, and atmospheric, water resource, and archeological values," 43 U.S.C. § 1701(a)(8). FLPMA directs the BLM to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b). "Unnecessary or undue

degradation" means, in part, "[a]voiding substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated." 43 C.F.R. § 3809.415(d), 65 F.R. 69998, 70122 (2001).

FLPMA regulations provide

> "[i]f State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. ***However, there is no conflict if the State law or regulation requires a higher standard of protection*** for public lands than this subpart." (Emphasis added) see, 43 C.F.R. § 3809.3, 65 F.R. at 70114.

The BLM's commentary on section 3809.3 recognizes that "[o]ne purpose of subpart 3809 is to establish a minimum level of protection for public lands...States may continue to assert jurisdiction over mining operations on the public lands." 65 F.R. at 70008-9.[4] The commentary cites *Granite Rock* as authority. *Id.* In *Granite Rock*, 480 U.S. 572, the Supreme Court determined that neither the federal Mining Act of 1872 nor land use statutes nor federal land management statutes preempted the California Coastal Commission's imposition of a permit requirement for operation of an unpatented mining claim in a national forest. The Supreme Court determined that

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[4] Indeed, the commentary provides a specific example where State law or regulations may provide a higher standard of protection, i.e. the restriction on cyanide leaching-based operations approved by voters in Montana. "In this situation, the State law or regulation will operate on public lands." *Id.*

Congress had not expressed an intent to displace state and local environmental regulation of mining claims in national forest lands. *Granite Rock*, 480 U.S. at 588. There is no reasonable basis to find that Congress intended to "occupy the field" of environmental regulation of surface mining.

### 3. Federal Materials Act of 1947 Does Not Conflict With CEQA or SMARA

Conflict preemption occurs when there is a conflict between federal and state law. *South Dakota Mining Association v. Lawrence County*, 977 F. Supp. 1396, 1401 (D.S.D. 1997). A conflict exists when the local enactment "stands as an obstacle to the accomplishment and execution of the full purposes of Congress," or "when it is impossible to comply with both federal and state law." *Id.* In this matter, SMARA and CEQA do not stand as an obstacle to meeting Congress' full purposes. It is also not impossible to comply with both SMARA and CEQA, and the Materials Act of 1947. In fact, SMARA[5] and CEQA[6] complement the Materials Act

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[5] The purpose of SMARA is to assure that: (1) adverse environmental impacts from surface mining are prevented or minimized and that mined lands are reclaimed; (2) the production and conservation of minerals are encouraged, while giving consideration to other values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment; and (3) residual hazards to the public health and safety are eliminated. Cal. Pub. Res. Code, § 2712.

[6] CEQA is also consistent with the Materials Act of 1947. The purpose of CEQA is to: (1) disclose to decision makers and the public the significant environmental effects of proposed activities; (2) identify ways to avoid or reduce environmental damage; (3) disclose to the public reasons for agency approval of projects with significant environmental effects; and (4) foster intra-agency cooperation and enhance public participation in the planning procees. Pub. Res. Code, §§ 21000, *et. seq.*

of 1947. Like the Materials Act, SMARA encourages the disposal of mineral deposits in a manner that is not detrimental to the public's interest. CEQA's core activity is environmental protection, not land use. CEQA does not mandate particular land uses but requires only that, however the land is used, damage to the environment is kept within prescribed limits. See, *Granite Rock*, 480 U.S. at 587. Moreover, CEQA may provide for a higher level of environmental protection than its federal counterpart, NEPA. While NEPA is largely procedural, CEQA requires that significant impacts be reduced to insignificant to the extent feasible. See, 14 Cal. Code Regs. §§ 15021, 15091; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S. Ct. 1835, 104 L.Ed. 2d 351 (1989). As provided by BLM regulation 43 C.F.R. § 3809.3, there is no conflict if the State law or regulation requires a higher standard of protection for public lands.

### 4. The Federal Decisions Do Not Preempt CEQA or SMARA But Rather Mandate Compliance

The federal government acknowledged the legitimacy of SMARA and CEQA in the environmental review of federal surface mining operations in an MOU entered into between the State of California, the United States Department of Interior, and the United States Department of Agriculture. SUF Nos. 15-16. Specifically, the MOU provides for cooperation "to insure that conditions required of operators (as defined by Federal law and by SMARA and any other relevant regulations or ordinances) in minimizing adverse environmental impacts conform to all applicable local, State, and Federal regulations." SUF No. 16. It is clear from the MOU that the federal government anticipates the State of California's right to impose environmental regulations on federal surface mining projects.

The ROD mandates, as a condition of approval, that CEMEX consult with, and obtain *approval* from state regulatory agencies, including the County of Los Angeles. SUF Nos. 9-14. The ROD also requires CEMEX to comply with CEQA. SUF No. 10. The ROD expressly recognizes that the County Planning Commission had already denied CEMEX's permit and that the fate of CEMEX's appeal to the County Board of Supervisors was uncertain. County Administrative Record ("AR") 09931. Thus, the federal government recognized at the time it approved the mining operation that the County could prevent CEMEX from mining if CEMEX refused to comply with reasonable local environmental regulations or procedures.[7]

The federal Contracts that CEMEX signed specifically grant CEMEX the right to void the contracts if CEMEX is prevented from mining by rulings or decisions of municipal, federal, state, or other governmental agencies, or any laws or regulations of such entities. SUF Nos. 6-7. The *force majeure* clauses expressly contemplate the possibility that CEMEX's state permit applications could be denied. The Contracts contain no language limiting SMARA's applicability, nor do the Contracts provide any justification for preempting the local environmental review process. To the contrary, every federal decision addressing the Project has conditioned approval on compliance with state laws and regulations.

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[7] In refusing to submit a new traffic study as the County requested, CEMEX has indeed refused to comply with reasonable environmental regulation. The additional traffic study requirement is per se reasonable because it is required under state law. AR 20442-20444.

### 5. The Federal Clean Air Act and Clean Water Act Mandate Compliance With CEQA

It is undisputed that the federal Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq., apply to the Project. In enacting the CAA, Congress delegated responsibility for implementing the provisions of the Act to the states through State Implementation Plans ("SIPs"). Requirements of SIPs are "binding as a matter of federal law." *Communities for a Better Environment v. Cenco Refining Co.("Cenco"),* 180 F. Supp. 2d 1062, 1069 (C.D. Cal. 2001). Under the CWA, the State Water Resources Control Board ("SWRCB") is designated as the agency authorized to exercise powers delegated to it under the CWA. 33 U.S.C. § 1313; Cal. Water Code § 13160.

FLPMA mandates that any contract issued by the federal government for the "use, occupancy, or development of the public lands" must contain a provision requiring compliance with "applicable State or Federal air or water quality standard[s] or implementation plan[s]." 43 U.S.C. § 1732 (West 2004). The ROD is consistent with Congressional intent because it specifically requires that CEMEX obtain air and water permits from the SCAQMD, the California Regional Water Quality Control Board—Los Angeles Region ("RWQCB-Los Angeles") and the California State Water Resources Control Board ("SWRCB"). SUF No. 11-13.

Where a specialized agency issues a permit for a discrete aspect of a project (here, air and water quality), it acts as a "responsible agency" under CEQA. *Cenco*, 180 F. Supp. 2d at 1069; 14 Cal. Code Reg. § 15381. Under California law, a responsible agency must review and consider the EIR

prepared by the lead agency and, if necessary, may impose additional mitigation measures and required further public participation prior to approval. 14 Cal. Code Reg. §§ 15050 (b), 15041(b). 14 Cal. Code Reg. § 15050(b). Pursuant to SCAQMD regulations, an applicant for a permit must submit an EIR where one has been prepared by the lead agency. SCAQMD Regulations, Regulation II, List and Criteria; SCAQMD Rule 210(d). SCAQMD Regulations promulgated under the authority of an approved SIP are "binding as a matter of federal law." *Cenco*, 180 F.Supp. 2d at 1068.

Similarly, the ROD requires approval or review of a General Industrial Activities Stormwater Permit ("GIASP"), a Section 401 Certification and a permit to appropriate water from the SWRCB.[8] The state agency is charged with review of CEMEX's Notice of Intent ("NOI") to operate under the applicable GIASP. The NOI is the functional equivalent of permit. *Environmental Defense Center, Inc. v. United States EPA*, 344 F.3d 832, 857 (9th Cir. 2003). Therefore, the state agency is a "responsible agency" under CEQA for purposes of reviewing CEMEX's NOI. *Cenco*, 180 F.Supp. 2d at 1069; 14 Cal. Code Reg. § 15381.

Moreover, pursuant to Section 401 of the CWA, the State must certify that the Project complies with applicable water quality requirements. 33 U.S.C. § 1341(a); *PUD NO. 1 v. Washington Department of Ecology*, 511 U.S. 700, 114 S. Ct.

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[8] California effectuates the requirements of the CWA primarily through institutions and procedures set out in certain provisions of the California Water Code (the "Water Code"), including those of the California Porter-Cologne Water Quality Act, Cal. Water Code § 13000, *et seq.* The Porter-Cologne Act established nine California Regional Water Quality Control Boards, Cal. Water Code §§ 13200, 13201, which operate under the purview of the State Board, see id. § 13225.

1900, 128 L. Ed. 2d 716 (1994). The states may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other appropriate requirement of State law. *PUD NO.1*, 511 U.S. 700, 713-4, 114 S. Ct. 1900, 1910; *Friends of the Earth v. United States Navy*, 841 F.2d 927, 930. Prior to certification, state regulations require review of a document prepared in accordance with CEQA (in this case the FEIR). *In the Matter of the Petition of North Star Hydro, LTD*, Order No. WQ 92-07, § 401 Certification, 1992 Cal. ENV LEXIS 13 (August 20, 1992). Each of these attendant local air and water permit requirements require the responsible agencies to comply with CEQA. Here, CEQA is not only a state mandate but a federal mandate.

### 6. The County Approval Process, County Conditions and County Denial Are Not Preempted

All the federal authorities confirm that local review and approval is a prerequisite to approval of CEMEX's mining operation. Plaintiffs may argue that they are not seeking to preempt CEQA and SMARA, but simply to preempt the County's particular application of CEQA and SMARA. There is no legal authority for the proposition that federal mining laws or any of the federal decisions in this case cut short the local environmental review process, prevent the County from considering Project conditions or prevent the County from denying the proposed Project.

#### a. The County Review Process and Denial Are Not Preempted

CEMEX's First Claim for Relief alleges that the County's subversion of "the local review and approval process into a

never ending delay and then denial of a Federally-approved Project constitutes a form of prohibition of the Project." SAC, 98:22-25. CEMEX further alleges that the abuse of process "has imposed additional costs, uncertainties and delays on the Project sufficient to jeopardize the implementation of the Federal land-use decisions..." SAC, 98:25-99:1. The result, as alleged by CEMEX, is that "the current and any further process of the County for the approval of CEMEX's application for a surface mining permit and reclamation plan is therefore preempted..." SAC, 99:11-14.[9] Although CEMEX contends that the County review and denial "frustrate federal intent," the undisputed facts establish the opposite as a matter of law. Indeed, preemption of the County review process frustrates the full implementation of federal law and the federal decisions. Truncating the CEQA process is *detrimental to the public interest.*

By comparison to the federal review, the local environmental review process was per se timely. First, it is undisputed that the County Planning Commission issued its denial prior to the BLM issuing the ROD on the August 1, 2000, in which it adopted the reduced North Fines Storage Area Alternative (RFNSA). SUF Nos. 22-23. In anticipation of the Planning Commission's denial, County staff offered to prepare a FEIR for the record. SUF No. 31. CEMEX

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[9] The United States makes similar allegations in its First and Third Claims for Relief alleging that "[t]he County's denial of a permit stands as an obstacle to the fulfillment of the congressional objective, evidenced in the Materials Act of 1947, to authorize the Department of Interior to administer a mineral materials sales program." U.S. Complaint, 25:26-28 And "[t]he County's delay in making the final decision concerning CEMEX's permit application stands as an obstacle to the fulfillment of BLM's mineral materials sales contracts, as contemplated by the Materials Act of 1947, and thus is preempted by federal law." U.S. Complaint, 32:9-12.

opposed this. *Id.* Second, it is undisputed that the IBLA's final federal decision on the Project was made January 8, 2002, less than two months prior to the County Board's vote of intent to deny on February 26, 2002. SUF Nos. 26-27. The County's Findings of Denial were issued shortly thereafter on April 23, 2002. SUF No. 30. Thus, the County's procedural denial occurred less than four months after the federal decision became final.

As to the procedural denial,[10] the County has authority under CEQA to disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the Project were approved, *as proposed.* 14 Cal. Code of Regs. § 15042; Cal. Pub. Res. Code § 21081.[11] The County exercised its authority and found that CEMEX failed to cooperate in substantiating that the action would not adversely affect the health, safety and welfare of persons residing in the surrounding area.[12] SUF No. 28. Had CEMEX agreed to a revised traffic analysis and to recirculate the FEIR for public review and comment, the CEMEX mine might be operational today. "An unreasonable delay by an applicant in meeting requests by the lead agency necessary for the preparation of an EIR shall suspend applicable time

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[10] The procedural denial specifically leaves open review of future mining proposals. AR 20443.

[11] Certification of a Final EIR is only required prior to approval of a project, not a denial. 14 Cal. Code of Regs. § 15090. The Planning Commission denied the Permit in 2000, therefore the County Board had no duty to certify the EIR unless it intended to approve the Permit.

[12] Any inquiry into the motives of administrators in the context of a challenge to administrative action is strongly disfavored. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 825, 28 L. Ed. 2d 136 (1971).

requirements." 14 Cal. Code of Regs. §§ 15108, 15109; *Carmel Valley View, Ltd. v. Maggini*, 91 Cal. App. 3d 318.

**b. The County's "Consideration" of Conditions Is Not Preempted**

CEMEX's Second Claim for Relief, alleging that conditions imposed by the County that are inconsistent with the conditions set forth in the federal ROD are preempted, is without merit. CEMEX does not allege that the County ever imposed unreasonable conditions but merely that "County has given consideration to conditions that conflict with the ROD, the Federal Contracts, and the Materials Act of 1947...." SAC, 101:4-7. If, as CEMEX alleged, the County is preempted from even considering conditions that conflict with the federally approved Project, then the local review process is rendered meaningless. CEMEX's suggestion that the County is barred from considering conditions amounts to an argument that it wants a *pro forma* rubber stamp from the County. Similarly, the United States fails to allege that the County Board ever actually imposed any local land-use policies inconsistent with the Project, only that the County made "efforts to impose local land-use policies" and "entertained" housing projects near the mine. U.S. Complaint, 27:4-27:19. As noted above, the only "conditions" the County Board imposed which CEMEX found unacceptable is the recirculation of the FEIR concerning traffic impacts. These conditions amount to reasonable environmental regulation and have no connection to a "land-use policy."

## B. CEMEX's Takings Claim and Claim That It Has Been Deprived Of Property Without Due Process Are Premature And Fail As a Matter of Law

CEMEX's Takings Claim fails as a matter of law for three reasons: (1) CEMEX's claim is premature, (2) CEMEX has no vested property interest in the sand and gravel, and (3) no taking can occur as a result of lawful government action. Moreover, because CEMEX's procedural due process claim concerns deprivation of the same property right alleged in its Takings claim, the due process claim is subsumed into the Takings claim and is also premature.

### 1. Fifth Amendment Takings Claim

CEMEX's Takings Claim is premature. The Supreme Court has held that if adequate State remedies exist for seeking just compensation, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-7, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); see also, *Cassettari v. County of Nevada*, 824 F.2d 735, 737-8 (9th Cir. 1987). California law permits a property owner to bring an inverse condemnation action to obtain just compensation for an alleged taking of property. See Cal. Code Civ. P. § 1245.260. Under California Code of Civil Procedure section 1235.170, "'property' [for purposes of eminent domain and inverse condemnation] includes real and personal property and any interest therein." *Baldwin Park Redevelopment Agency v. Irving*, 156 Cal. App. 3d 428, 435 (1984); *McMahan's of Santa Monica*, 146 Cal. App. 3d 683, 700 (1983). In 1987, California recognized inverse condemnation claims based on regulatory takings. *First*

*English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

CEMEX alleges that "Plaintiff has a protectible property interest in its Federal Contracts with the United States and the ROD, including all conditions, decisions and approvals relating thereto." SAC, 118: 21-23. CEMEX claims all beneficial use of its property interests were taken by the County. SAC, 118: 24-28. If the County did indeed deprive CEMEX of a property interest, without payment, just compensation can be obtained by using California's inverse condemnation procedures. Whether or not CEMEX has legitimate federal claims and is permitted to pursue its related state claims in this court, does not alter the conclusion that the Fifth Amendment Takings claim is premature. *See*, Court's July 29, 2002 Order, 15:21-25, citing *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 160-165,118 S. Ct. 523 (1997).

Not only is CEMEX's claim premature, but CEMEX's property interest in the sand and gravel has not yet vested. County and State approval is a *condition precedent* to CEMEX's rights under the contracts to extract sand and gravel. A *condition precedent* requires certain performance or a condition which must take place before a legal right can vest. *See, e.g., Wien Consolidated Airlines, Inc. v. C.I.R.*, 528 F.2d 735 (9th Cir. 1976). A right that has not as yet vested is not a property interest for purposes of a Fifth Amendment Takings claim. *Lynce v. Mathis*, 519 U.S. 433, 440, 117 S. Ct. 891, 895, 137 L. Ed. 2d 63 (1997). Although CEMEX may have certain rights under the contracts, i.e. as to price and tonnage, the right to extract sand and gravel is expressly subject to CEMEX's compliance with local rules and regulations. The Contracts expressly provide: "[t]itle to

materials sold hereunder shall pass to Purchaser only upon severance or extraction of and proper payment of such materials." SUF No. 3. If CEMEX is unable to obtain approval, the *force majeure* clause of the contract excuses CEMEX's performance. SUF Nos. 6 and 7. CEMEX has no vested property right in the sand and gravel and therefore no taking claim.

Cases cited by the Court in its July 29, 2002 Order are inapposite. *See, Madera Irrigation District v. Hancock*, 985 F.2d 1397, 1399 (9th Cir. 1992) [Court found that water district had a vested property right where contract did not contain any condition precedent to right to a "permanent water supply"] and see, *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814 (9th Cir. 1990) [Court determined that sale of "excess lands" within 10 years was a *condition precedent* to the landowners rights to receive subsidized water after the 10 years expired. Landowners who failed to sell their excess lands had no contractual right to the subsidized water for more than 10 years, despite the fact that they were enjoined from selling their "excess land" during part of the 10 year period.] Finally, CEMEX has not been deprived of property as a result of unlawful government action. As discussed above, County's environmental review and conditional denial are lawful actions required under CEQA and SMARA, as mandated by federal law and the federal decisions.

### 2. CEMEX's Due Process Claim

When a plaintiff alleges that he was denied a property interest without due process, and the loss of that property interest is the same loss upon which the plaintiff's takings claim is based, the plaintiff must utilize the remedies applicable to the takings claim. "It is appropriate in this case to subsume

the more generalized Fourteenth Amendment due process protections within the more particularized protections of the 'Just Compensation Clause.'" *Millet v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991); see, *Cassettari v. County of Nevada*, 824 F.2d 735, 738-739 (1987); and *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 879 (9th Cir. 1987). Accordingly, until a plaintiff has resorted to the condemnation procedures to recover compensation for the alleged taking, the procedural due process claim is not ripe because it is in essence based on the same deprivation. (*Id.*)

The procedural due process argument that CEMEX asserts here is that the County's implementation of environmental regulations deprived it of its contractual interests. The property interest supporting this due process claim is exactly the same one that CEMEX asserts has resulted in the taking of its property without just compensation in violation of the Fifth Amendment.[13] Under these circumstances, CEMEX must first obtain a final adverse decision with respect to the environmental review by the County, and then make use of the available inverse condemnation remedies, before its procedural due process claim may be considered ripe for determination. *Id.*

### C. CEMEX's Claim That It Has Been Denied Equal Protection Fails As a Matter of Law

To state an equal protection claim, CEMEX must charge the County not only with deliberately acting against it, but also with singling it out for selective enforcement on an impermissible basis. *Arroyo Vista Partners v. County of Santa*

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[13] City incorporates by reference the arguments made in section III.B(1), above.

*Barbara*, 732 F.Supp. 1046, 1055, citing *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2nd Cir. 1988). Because CEMEX does not fall within a suspect class, the County need only show that its actions were rationally related to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 303-304, 96 S. Ct. 2513, 2516-2517, 49 L. Ed. 2d 511 (1976).

CEMEX's lawsuit is against the "County of Los Angeles." Therefore, CEMEX must allege that the "County of Los Angeles," not individual board members, staffers or even the Board itself, deliberately acted against it by singling it out for selective enforcement. CEMEX has failed to allege that the County, i.e. the voting public, has taken any action against its interests. Instead, CEMEX alleges that the County Board "proposed conditions that have not been applied to other similar projects or applicants." SAC, 112:2-3. CEMEX further alleges that a single supervisor "disregarded the County-wide requirements for distribution of EIRs..." and that County staff imposed "arbitrary and discriminatory requirements and standards for the traffic analysis of impacts of CEMEX's Project." SAC, 113:11-24.

None of these allegations sufficiently state an Equal Protection claim against the County of Los Angeles. In *Arroyo Vista*, 732 F. Supp. 1046, plaintiffs brought an action against the entire Board of Supervisors and the County of Santa Barbara. The court found the equal protection challenge defective because plaintiffs failed to allege that the majority of the Board acted with suspect motives. Allegations against a single Board member were insufficient to implicate the Board. Similarly, CEMEX's allegations against the County Board for proposing conditions, and against County staff and an individual Board member are insufficient.

Moreover, there is no "similar project" to the Soledad Canyon Project. It is undisputed that the Project would be one of the largest, federal sand and gravel contracts permitted by the BLM. SUF 17. This Project is *per se* unique. CEMEX cannot, as a matter of law, establish that it was treated differently from similar applicants because none exist. Finally, the County Board's condition that the FEIR be recirculated concerning traffic issues is rationally related to the Board's authority as lead agency under CEQA.

**D. Dismissal Of Plaintiffs' Federal Claims Requires Dismissal of CEMEX's Pendent State Claims**

CEMEX's state claims of traditional mandate, administrative mandamus and inverse condemnation are predicated on pendent jurisdiction. If Plaintiffs' federal preemption claims and constitutional claims brought under 42 U.S.C. § 1983 are without merit and dismissed, the Court is without jurisdiction over the pendent state claims. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1996). The United States is not a party to these pendent state claims. As such, CEMEX's Sixth, Eighth and Ninth claims must be dismissed.

**E. Pursuant to the "*Younger*" Abstention Doctrine the District Court Must Abstain From Taking Jurisdiction and Dismiss the Action**

In *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L. Ed. 2d 669 (1971) the United States Supreme Court held that a federal court may not enjoin pending state court criminal proceedings. *See, Mission Oaks Mobile Home Park v. City of*

*Hollister*, 788 F.Supp. 1117, 1120 (N.D.Cal.1992). The principles of *Younger* have been expanded to apply to pending state court civil actions between private litigants, and state administrative proceedings that are adjudicatory in nature. *See, Fresh International Corp. v. Agriculture Labor Relations Board*, 805 F. 2d at 1356-1357; *see also, Green v. City of Tucson*, 255 F. 3d 1086, 1095 (9th Cir. 2001); *Mission Oaks Mobile Home Park v. City of Hollister*, 768 F. Supp. at 1120; *Grand Metropolitan PLC v. Pillsbury Co.*, 702 F. Supp. 236, 238 (D. Ariz.1988) and *Communications Telesystems v. California Public*, 14 F. Supp. 2d 1165, 1167 (N.D. Cal.1998).

The Supreme Court has established a three-part test for determining whether abstention in favor of a state proceeding is appropriate in a given situation. Abstention is proper if: (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Fresh International Corp. v. Agriculture Labor Relations Board*, 805 F.2d at 1357-1358; *citing Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 ,102 S.Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982). The Ninth Circuit Court of Appeals has supplemented this three-part test with the additional requirement that the relief sought in the federal litigation must actually "interfere" with the ongoing state proceedings. *Green v. City of Tucson*, 255 F.3d at 1098.

Abstention is the exception, not the rule. *Id.* at 1089. However, "[w]hen a case falls within the proscription of *Younger*, a district court must dismiss the federal action." *Communications Telesystems v. California Public*, 14 F.Supp. 2d at 1168. "Where a case is properly within [the *Younger*] category of cases, there is no discretion to grant injunctive

relief." *Fresh International Corp. v. Agriculture Labor Relations Board*, 805 F.2d at 1356. Abstention is inappropriate if a challenged state action "clearly conflicts with preemptive federal law." *Fresh International Corp. v. Agriculture Labor Relations Board*, 805 F.2d at 1361. As outlined above, there is no preemption.

### 1. The Relief Sought by CEMEX Interfered With State Proceedings

A threshold condition for abstention under *Younger* is actual "interference" with ongoing state proceedings that are judicial in nature. *Green v. City of Tucson*, 225 F.3d at 1096. The relief sought in the federal action must in some manner directly "interfere" in the state proceedings by either truncating or terminating the proceedings. *Id.* at 1097-98. The relief CEMEX seeks in its federal lawsuit will either truncate or terminate the County's adjudicatory proceedings. In its federal complaint, CEMEX is seeking two alternative forms of relief. CEMEX is seeking in the first place to have the District Court preempt *(i.e.*, terminate) the County's SMARA and CEQA proceedings. SAC, Prayer for Relief. Alternatively, CEMEX is asking the Court to enjoin the County from conducting further environmental analyses under CEQA and order the County to immediately issue CEMEX a surface mining permit under SMARA. *Id.* CEMEX's relief would result in a substantial truncation of the SMARA and CEQA proceedings. The threshold condition for abstention under *Younger* has, therefore, been met.

### 2. The State Proceedings are Ongoing

The first part of the three-part test is that the state proceedings must be ongoing. "Abstention is required only

when the state proceedings have been initiated 'before any proceedings of substance on the merits have taken place in federal court.'" *Fresh International Corp. v. Agriculture Labor Relations Board*, 805 F.2d at 1358. "[T]he 'critical question is not whether the state proceedings are still ongoing, but whether the state proceedings were underway before the initiation of the federal proceedings.'" *Mission Oaks Mobile Home Park v. City of Hollister*, 788 F. Supp. at 1121; citing *Beltran v. California*, 871 F.2d 777, 782 (9th Cir.1988).

According to its complaint, when CEMEX filed its federal lawsuit, a hearing was already scheduled before the Board of Supervisors for February 26, 2002 to consider CEMEX's appeal. SAC: 58:24-59:1. It is clear from CEMEX's federal complaint that the state proceedings under SMARA were ongoing when the federal litigation was initiated. The fact that the County subsequently denied CEMEX's permit application has no relevance. "Where *Younger* abstention is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after state proceedings have ended." *Beltran v. State of California*, 871 F.2d at 782. "*Younger* abstention requires ***dismissal*** of the federal action." *Id.* (emphasis in original).

### 3. The State Has an Important Interest in the SMARA and CEQA Process

"*Younger* abstention is appropriate only where important state interests would be affected by the federal action." *Fresh International Corp. v. Agriculture Labor Relations Board*, 805 F.2d at 1358. Important state interests can include interests in the elimination of prohibited sex discrimination, *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718, 2723, 91 L. Ed. 2d

512, *Williams v. Red Bank Board of Education,* 662 F.2d 1008, 1018 (3d Cir.1981)(abstaining in deference to teacher tenure termination proceedings), education, police disciplinary proceedings, *McDonald v. Metro-North Commuter Railroad Division,* 565 F. Supp. 37, 40 (S.D.N.Y.1983)(state interest in police officer disciplinary proceedings for making false statements), interests for purposes of abstention in the control and transfer of liquor licenses, *Grand Metropolitan PLC v. Pillsbury Co.*, 702 F. Supp. at 238, and the regulation of mobile home rents. *Mission Oaks Mobile Home Park v. City of Hollister*, 788 F. Supp. at 1121-22. The State of California has an important interest in protecting the health, safety and welfare of its citizens. Ensuring that the objectives of SMARA and CEQA (pg. 10 f.n. 4-5) above, are fulfilled is crucial to this interest.[14]

### 4. CEMEX Can Raise its Federal Claims in the State Proceedings

A state appellate court review of an agency decision satisfies *Younger*'s third prong. *Beltran v. State of California*, 871 F.2d at 783. "[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. at 629, 106 S.Ct. at 2724. The California Appellate Courts provide a full and fair opportunity for a litigant to bring federal claims. *Mission Oaks Mobile Home Park v. City of Hollister*, 788 F.Supp. at 1122.

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[14] *See, Kim-Stan, Inc. v. Department of Waste Management*, 732 F.Supp.646, 652 (E.D.Va.1990)(holding that, for purposes of abstention under *Younger*, the State of Virginia has a vital interest in the health, safety and welfare of its citizens and that protecting the waters from environmental hazards was crucial to that interest).

CEMEX brought its federal claims of preemption, due process, and equal protection before the County of Los Angeles. Even if the County cannot properly rule on these claims, the issues have been preserved and can be asserted in any state court review of the County's decision. The final part of the three-part test for abstention has, therefore, been satisfied.

## IV. CONCLUSION

Based on the foregoing, City respectfully requests that its Motion for Summary Judgment be granted in full. In the alternative, City requests that summary adjudication be granted as to each and every claim for relief.

DATED: April 2nd, 2004

RESPECTFULLY SUBMITTED,

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By: /s/
Carl K. Newton, City Attorney
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## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I caused a true and correct copy of CITY OF SANTA CLARITA'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT / ADJUDICATION to be served via overnight mail this 2nd day of April, 2004, to the following:

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# EXCERPTS FROM
# [Pages i-iii and 49-50]

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FILING FEE EXEMPT
GOV'T CODE § 6103

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**FILED**
CLERK, U.S. DISTRICT COURT
**APR - 5 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

CEMEX, INC., a Louisiana Corporation,
Plaintiff,
v.
COUNTY OF LOS ANGELES, and
DOES 1 THROUGH 10, INCLUSIVE
Defendants.

---

UNITED STATES OF AMERICA,
Plaintiff-in-Intervention.

---

City of Santa Clarita,
Defendant-in-Intervention.

---

Case No. 0200747 DT (FMOx)
Judge Dickran Tevrizian
Courtroom 880

**CITY OF SANTA CLARITA'S OPPOSITION TO MEMORANDA IN SUPPORT OF MOTION TO ENTER CONSENT DECREE**

[DECLARATIONS OMITTED]

| | |
|---|---|
| Date: | May 3, 2004 |
| Time: | 10:00 a.m. |
| Courtroom: | 880 |
| Complaint Filed: | 01/25/02 |
| First Amended Complaint Filed: | 04/11/02 |
| Second Amended Complaint Filed: | 05/09/02 |
| Trial Date: | None set |

## TABLE OF CONTENTS

**Page No.**

TABLE OF CASES AND AUTHORITIES ..... iv

I. INTRODUCTION ..... 1

II. FACTUAL AND PROCEDURAL HISTORY OF FEDERAL AND STATE GOVERNMENTAL APPROVAL ACTIONS ..... 3

A. Federal Governmental Process ..... 3

B. State Governmental Process ..... 8

C. Events Subsequent to County's Denial of Project ..... 12

III. LEGAL ARGUMENT ..... 14

A. The Court Does Not Have The Authority To Enter The Proposed Decree Absent A Finding That CEQA Is Preempted ..... 14

B. The Proposed Decree Should Not Be Approved Because It Fails To Satisfy the Required Factors ..... 17

C. The Proposed Consent Decree Fails To Meet The First Factor Because It Violates State and Federal Environmental Laws ..... 17

1. NEPA, the ROD and the Federal Contracts Mandate CEQA's Application to the Project ..... 18

2. The County Review Process Up Through February 2002, Was A Reasonable Environmental Regulation Of The Project And Further Review Is Both Reasonable And Necessary ..... 21

3. The Proposed Decree Violates CEQA And NEPA ..... 24

a. The Project sought to be approved in the Proposed Decree is a significantly different project ..... 26

(1) The discovery of the Arroyo Toad and the additional five new production wells and three new monitoring wells should have triggered recirculation ..... 26

(2) The Project acceleration condition should have triggered recirculation of the FEIR ..... 29

(3) Project acceleration, combined with undisclosed cancer risks raised by AQMD, constitute new information requiring recirculation ..... 31

b. The Duress Conditions in the Proposed Decree directed against the County render it unfit to "Police" the Project Mitigation Measures in violation of CEQA and NEPA ..... 34

c. New Findings that repudiate 2002 Findings without any new environmental review violate CEQA ..... 37

D. The Proposed Decree Fails To Satisfy The First Factor Because It Violates The Administrative Procedure Act ..... 40

E. The Proposed Decree Fails to Satisfy The First Factor Because It Violates the Federal Clean Air Act, Federal Land Policy and Management Act, and Federal Clean Water Act ..... 41

F. The Proposed Decree Fails to Satisfy The Second Requirement Because It Is Not Freely Entered Into ..... 45

G. The Proposed Decree Fails To Meet The Third Requirement Regarding Impact To Third Parties Because Substantial Public Interests Will Be Impaired By Entry Of The Proposed Decree That Significantly Outweigh Any Public Interest In Settlement ..... 46

1. The Proposed Decree Is Unreasonable and Against Public Policy Because It Violates The City's First Amendment Rights To Petition Government ..... 47

2. The Proposed Decree Is Unreasonable And Against Public Policy Because It Acts As A Prior Restraint On First Amendment Rights Of Free Speech ..... 48

3. The Proposed Consent Decree Infringes Upon The Public's Right of Review Under NEPA and CEQA. ..... 49

H. The Proposed Consent Decree Is Unfair, Unjust and Infringes Upon The Rights of Third Party Non-Consenting Intervenor Santa Clarita ..... 49

IV. CONCLUSION ..... 50

* * * * *

**EXCERPTS FROM**
**[Pages 49-50]**

**H. The Proposed Decree Is Unfair, Unjust and Infringes Upon The Rights of Third Party Non-Consenting Intervenor Santa Clarita**

Although federal courts recognize a strong policy favoring settlement, "our preferences for settlement and accord are insufficient to justify the imposition of a decree that infringes upon the rights of third parties." *Latin American Citizens*, 999 F.2d at 846. In "multiparty litigation, two parties may resolve all of the issues that do not affect a third party, ask the court to include only this settlement in a consent decree, and submit to the court for adjudication of the remaining issues, disputed between them and the third party." *City of Miami*, 664 F.2d at 440.

Here, the Proposed Decree infringes upon the rights of the City because it vitiates the City's absolute right to consultation pursuant to CEQA and violates the procedures established to ensure adequate environmental review before a project is approved for implementation (*See* Declarations of Susan O'Carroll and Bill Piazza filed in support of Opposition to Motion to Enter Consent Decree filed concurrently herewith.) It is the law of the case that the City has a "right of consultation" that is "granted and guaranteed by statute" and "outlined by CEQA." *CEMEX, Inc. v. County of Los Angeles*, 2004 WL 363354 at * 2.

The City's claims are valid. The fact that CEQA was intentionally circumvented to obtain a settlement favorable to the Parties, and the rational used to achieve this unfair result,

is not only illegal and improper, it also unfairly and unjustly infringes on the rights of the general public who have a legal right to participate in the process. What is most alarming in this matter is that the voice of the residents and property owners of the City - the individuals who will be experiencing the harmful impacts of this massive Project - have been stifled, as these individuals have been prohibited from participating in the CEQA process, which process is designed to protect the very environment in which they reside.

## IV. CONCLUSION

For the reasons stated above, Defendant-in-Intervention City of Santa Clarita respectfully requests that the Motion to Enter the Consent Decree be denied.

DATED: April 2, 2004

RESPECTFULLY SUBMITTED,

BURKE, WILLIAMS & SORENSEN, LLP

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# APPENDIX J

**EXCERPTS FROM PAGES 2-3**
**EXHIBIT A [Pages 4, 8, 9 and 13-15] and**
**EXHIBIT B [Pages 24, 37, 38, and 40-49]**

**Appeals Case No. 04-56050**
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

CEMEX INC., a Louisiana Corporation,
Plaintiff-Appellee
and
UNITED STATES OF AMERICA,
Plaintiff-in-Intervention
v.
LOS ANGELES COUNTY,
Defendant,
and
CITY OF SANTA CLARITA,
Defendant-in-Intervention/Appellant

---

**On Appeal From the United States District Court for the Central District of California, Los Angeles District Court Case No. CV-02-00747-DT**

**APPELLANT'S REQUEST FOR JUDICIAL NOTICE**
[Federal Rules of Evidence, Rule 201]

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Pursuant to Federal Rules of Evidence, Rule 201, the Court of Appeals shall take judicial notice of adjudicative facts if requested by a party and supplied with necessary information. Federal Rules of Evidence, Rule 20(a), (b) and (d). Judicial notice may be taken at any stage of the proceeding, including on appeal. Federal Rules of Evidence, Rule 201 (f); *Government of Canal Zone v. Burjan*, 596 F.2d 690 (5th Cir. 1979). The Court may also take judicial notice of court files and records. *Schweitzer v. Scott*, 469 F. Supp. 1017 (C.D. Cal. 1979). Based on these authorities, Appellant City of Santa Clarita ("City") asks this Court to take judicial notice of the following:

1. The district court's files and records in *City of Santa Clarita v. Los Angeles County Board of Supervisors*, (CV 04-7355). Attached as Exhibit A to this Request for Judicial Notice is CEMEX's "Memorandum of Points and Authorities in Support of Motion for Stay of Action Pending Appeal," and attached as Exhibit B is the district court's "Order **Denying** Plaintiff City of Santa Clarita's Motion to Remand Removed Action to the Superior Court of the State of California for the County of Los Angeles; and **Granting** Real Party-In-Interest CEMEX, Inc.'s (as joined by defendants Los Angeles County Board of Supervisors and County of Los Angeles and Real-Party-In-Interest the United States Department of Interior) Motion for Stay of Action Pending Appeal." (emphasis original) Both Exhibit A and Exhibit B are part of the district court's file in *City of Santa Clarita v. Los Angeles County Board of Supervisors*. These documents are relevant because they demonstrate that Appellees are attempting to use the Consent Decree at issue in this appeal to bind non-parties to the Decree and prevent substantive judicial review of the Final Environmental Impact Report's CEQA compliance and legal adequacy. The Motion for Stay and the Order granting that motion were not included in the Excerpts of Record filed

with Appellant's Opening Brief because both those documents were generated after the City filed its Opening Brief.

* * * * *

**EXCERPTS FROM EXHIBIT A**
**[Pages 4, 8, 9 and 13-15]**

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CITY OF SANTA CLARITA,
Petitioner/Plaintiff,

vs.

LOS ANGELES COUNTY BOARD OF SUPERVISORS; COUNTY OF LOS ANGELES, and DOES 1 through 10, inclusive,
Respondents/Defendants.

---

CEMEX, INC., a Louisiana Corporation; UNITED STATES DEPARTMENT OF INTERIOR; and ROES 1 through 10, inclusive,
Real Parties in Interest.

---

CASE NOS. CV 04-7355 DT (FMOx)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR STAY OF ACTION PENDING APPEAL**

DATE: November 15, 2004
TIME: 10:00 a.m.
CTRM: 880

Real party in interest CEMEX, Inc. ("CEMEX") hereby files this Memorandum of Points and Authorities in Support of the Notice of Motion and Motion for Stay of Proceedings Pending Appeal, filed concurrently herewith.

* * * * *

**EXCERPTS FROM EXHIBIT A**
**[Pages 8 and 9]**

## I. INTRODUCTION

On July 30, 2004, petitioner/plaintiff City of Santa Clarita (the "City") filed this action in the Superior Court of the State of California, County of Los Angeles, Central District, entitled *City of Santa Clarity v. Los Angeles County Board of Supervisors: County of Los Angeles*, Case No. BS 091566 (the "CEQA action").[1] The CEQA action, however, is little more than an attempt by the City to re-litigate in state court challenges it made to a Consent Decree approved and entered

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[1] A true and correct copy of the City's Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Petition") is filed concurrently with the Appendices of Exhibits as Exhibit 1.

by the District Court on May 5, 2004 (the "Order"[2]) in *CEMEX v. County of Los Angeles*, Case No. CV-02-747 DT (FMOx) (the "CEMEX action").

On June 3, 2004, the City appealed the Order to the Ninth Circuit Court of Appeals. Thus, this Court's determinations in the CEMEX action, as embodied in the Order and the Consent Decree, are now before the Ninth Circuit. In essence, the CEQA action involves many of the same claims, litigated between the same parties, that are presently on appeal from the CEMEX action to the Ninth Circuit.

On September 3, 2004, respondents/defendants Los Angeles County Board of Supervisors and County of Los Angeles (collectively the "County") and real party in interest United States Department of Interior ("United States") removed the CEQA action to this Court. Because many of the current claims in the CEQA action repeat or mirror claims addressed in the CEMEX action by the Order, these claims should be stayed pending resolution of the appeal of the CEMEX action to the Ninth Circuit to avoid, among other things, duplicative and wasteful litigation.

This Court has the authority under its inherent discretion, as well as the All Writs Act, 28 U.S.C. § 1641 ("AWA"), to issue those orders necessary to protect and give effect to its judgments. In this context, a stay order is appropriate in order to not only give effect to the Order, but also to avoid potentially conflicting adjudications arising from the CEQA action while the City's appeal of the same claims to the Ninth Circuit in the CEMEX action is ongoing. Otherwise, not only

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[2] A true and correct copy of the Order, and the Consent Decree, are filed concurrently with the Appendices of Exhibits as Exhibits 3 and 4, respectively.

would the parties suffer significant additional expenses litigating the same claims in two forums, and the Court would be burdened with another, possibly unnecessary, action, but any determinations in the CEQA action could ultimately be void or otherwise rendered meaningless based on the outcome of the Ninth Circuit appeal. Accordingly, the County respectfully requests that the Court stay the CEQA action pending the outcome of the Ninth Circuit appeal in the CEMEX action.

* * * * *

**EXCERPTS FROM EXHIBIT A**
**[Pages 13, 14 and 15]**

**B. The Relief Requested By The City In The CEQA Action Would Directly Interfere With The Injunctive Relief Ordered By This Court In The Consent Decree**

Stated simply, the CEQA action is little more than a disguised attempt to relitigate the City's opposition to the Consent Decree in the CEMEX action.[3] This fact is best evidenced by comparing the injunctive relief set forth in the Order and Consent Decree with the relief requested in the City's Petition in the CEQA action.

The Order and Consent Decree command the following: (1) the County is enjoined from taking any actions conflicting with the provisions, terms, requirements, and obligations set

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[3] A true and correct copy of the City's Opposition to Memoranda in Support of Motion to Enter Consent Decree filed on April 2, 2004 ("Opposition") is filed concurrently with the Appendices of Exhibits as Exhibit 2.

forth in this Consent Decree; (2) the County is enjoined from further delaying, frustrating or otherwise interfering with the implementation of the Project as approved by the Bureau of Land Management ("BLM"), including through delays in approving the Project; (3) the County is ordered to complete the environmental review process pursuant to CEQA and as mandated in this Consent Decree within sixty (60) days from the date of entry of this Consent Decree; (4) the County is enjoined from conducting further environmental review for the County-Approved Project prior to issuance of its approval; (5) the County is ordered to issue Project Findings, a Surface Mining Permit, and Reclamation Plan in accordance with the forms of these documents attached to the Consent Decree with in sixty (60) days from the date of entry of the Consent Decree; (6) the County is enjoined from taking any actions that interfere with, conflict with, or otherwise frustrate or impair the terms of this Consent Decree, and will take no action to contradict the findings or determinations therein; (7) the County is further enjoined from taking any actions which seek to impair the implementation of this Consent Decree, or that interfere with CEMEX's or the United States' interests relating to the Project or the Project Site; and (8) the County is enjoined from taking any actions which affect the rights or interests of CEMEX or the United States relating to the Project or Project Site, before any other body, agency or official. (*See* Consent Decree, pp. 60:8-61:9)

The City's prayer for relief in the CEQA action seeks the following relief, all in direct conflict with the Consent Decree: (1) issuance of a preemptory writ of mandate ordering the County to set aside certification of the EIR and ancillary documents; (2) issuance of a TRO or preliminary injunction restraining the County from taking further action to implement or proceed with the Project; (3) a determination that the County violated CEQA and that the County's approvals

relating to the Project are void; (4) a determination that the FEIR is inadequate and that a new EIR must be prepared; (5) issuance of a preliminary injunction enjoining the County, the United States and CEMEX from taking further action to proceed with the Project. (*See* Petition, p. 51:1-18)

The relief requested by the City in the Petition thus challenges the County's actions that were undertaken based on: (1) the County's independent review and analysis of the FEIR and administrative record, which includes the County's analysis of the claims for and against the Project and FEIR made by all commenting parties, including CEMEX's and the United States' claims that federal law preempted the County from further environmental review; and (2) the stipulations in the Consent Decree and the determination by the District Court in the CEMEX Action. The Consent Decree sets forth the parameters of permissible County action based on the parties' and the Court's conclusion regarding the effect of federal laws and decisions on County authority, and thus the applicability of preemption principles was adjudicated in the CEMEX Action. The City's purported state law claims are little more than disguised challenges to the preemption issue that was resolved in the Consent Decree and pursuant to which the County conducted its actions now at issue, namely, the extent to which the County had further authority or discretion to conduct environmental review for the Project.

* * * * *

**EXCERPTS FROM EXHIBIT B**
**[Pages 24, 37, 38, and 40-49]**
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**ENTERED**
CLERK, U.S. DISTRICT COURT
**NOV 18 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

**FILED**
CLERK, U.S. DISTRICT COURT
**NOV 15 2004**
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

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JS-2/JS-3
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CITY OF SANTA CLARITA,
Petitioner/Plaintiff,
vs.
LOS ANGELES COUNTY BOARD OF SUPERVISORS; COUNTY OF LOS ANGELES, and DOES 1 through 10, inclusive,
Respondents/Defendants.

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CEMEX, INC., a Louisiana Corporation; UNITED STATES DEPARTMENT OF INTERIOR; and ROES 1 through 10, inclusive,
Real Parties in Interest.

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CASE NOS. CV 04-7355 DT (FMOx)

ORDER **DENYING** PLAINTIFF CITY OF SANTA CLARITA'S MOTION TO REMAND REMOVED ACTION TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; AND **GRANTING** REAL PARTY-IN-INTEREST CEMEX, INC.'S (AS JOINED BY DEFENDANTS LOS ANGELES COUNTY BOARD OF SUPERVISORS AND COUNTY OF LOS ANGELES AND REAL PARTY-IN-INTEREST THE UNITED STATES DEPARTMENT OF INTERIOR) MOTION FOR STAY OF ACTION PENDING APPEAL

* * * * *

**[Exhibit B; Pages 37, 38]**

**B. Analysis**

Cemex seeks a stay of this action pending the outcome of the Ninth Circuit appeal in *Cemex v. County of Los Angeles*, Case No. CV 02-747 DT (FMOx) ("Cemex Action").[6] It argues that this current action ("CEQA Action") involves many of the same claims litigated between the same parties that are presently on appeal in the Cemex Action. Specifically, Cemex claims that (1) the relief requested by the City in the CEQA Action would directly interfere with the injunctive relief ordered by this Court in the Consent Decree and (2) the CEQA Action predominantly raises issues already addressed by the Judgment entering the Consent Decree.

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[6] City appealed this Court's Order Granting Motion for Entry of Consent Decree on June 3, 2004.

In Opposition, City argues that the Consent Decree is no bar to proceeding with this action. It claims that in the Appeal, its right of consultation under CEQA is at stake, and that here, it challenges the adequacy of the County's environmental review from its inception to date. It states that in this action, the substantive merits of the County's FEIR certification and Project approval are squarely at issue, and that the challenged County actions occurred approximately 60 days after the entry of the Consent Decree.

Applying the Standard, supra, this Court finds that a stay of this CEQA Action is warranted.

* * * * *

**[Exhibit B: Pages 40-49]**

**2. The orderly course of justice measured in terms of whether the stay would simplify or complicate issues, proof and questions of law weighs in favor of a stay.**

Another factor is "the orderly course of justice measured in terms of whether the stay would simplify or complicate issues, proof, and questions of law." *CMAX, Inc.*, 300 F.2d at 268. This Court finds that a stay would simplify issues, proof and questions of law. As Cemex asserts, the relief requested by the City in the CEQA Action would directly interfere with the injunctive relief ordered by this Court in the Consent Decree, and the CEQA Action predominantly raises issues already addressed by the Judgment entering the Consent Decree.

**a. Conflict regarding Injunctive relief**

Comparing the injunctive relief set forth in the Order and

Consent Decree with the relief requested by City in this CEQA Action, it is evident that City is attempting substantially to relitigate its Opposition to the Consent Decree in the Cemex Action.

The Order and Consent Decree mandate the following:

1. The County is enjoined from taking any actions conflicting with the provisions set forth in this Consent Decree, and is enjoined to comply with all provisions, terms, requirements and obligations set forth in this Consent Decree;

2. The County is enjoined from further delaying, frustrating or otherwise interfering with the implementation of the Project as approved by the Bureau of Land Management ("BLM"), including through delays in approving the Project;

3. The County is ordered to complete the environmental review process pursuant to CEQA and as mandated in this Consent Decree within sixty (60) days from the date of entry of this Consent Decree;

4. The County is enjoined from conducting further environmental review for the County-Approved Project prior to issuance of its approval;

5. The County is ordered to issue Project Findings, a Surface Mining Permit, and Reclamation Plan in accordance with the forms of these documents attached to the Consent Decree within sixty (60) days from the date of entry of the Consent Decree;

6. The County is enjoined from taking any actions that

interfere with, conflict with, or otherwise frustrate or impair the terms of this Consent Decree, and will take no action to contradict the findings or determinations therein;

7. The County is further enjoined from taking any actions which seek to impair the implementation of this Consent Decree, or that interfere with Cemex's or the United States' interests relating to the Project or the Project Site; and

8. The County is enjoined from taking any actions which affect the rights or interests of Cemex or the United States relating to the Project or Project Site, before any other body, agency or official.

(Consent Decree, pp. 60-61.)

In this action, City seeks the following relief, all of which conflicts with the Consent Decree:

1. issuance of a peremptory writ of mandate ordering the County to set aside certification of the EIR and ancillary documents;

2. issuance of a TRO or preliminary injunction restraining the County from taking further action to implement or proceed with the Project;

3. a determination that the County violated CEQA and that the County's approvals relating to the Project are void;

4. a determination that the FEIR is inadequate and that a new EIR must be prepared;

5. issuance of a preliminary injunction enjoining the County, the USDOI and Cemex from taking further action to proceed with the Project.

(Petition, p. 51.)

The Consent Decree sets forth the parameters of permissible County action based on determinations regarding the effect of federal laws and decisions on County authority. As such, the applicability of preemption principles was adjudicated in the Cemex Action, and here, City is attempting to challenge the preemption issue by asserting state law claims. City is also attempting to challenge the very actions of the County – conducting environmental review for the Project – which were authorized by the Consent Decree.

In its Opposition, City does not dispute that its requested relief directly contradicts the Consent Decree's injunctive provisions. Instead, it argues that "if this court directs the County to de-certify the FEIR and revoke the Permit, then the County is obligated to do so and would not be violating the injunctive provisions." In other words, if the County is subsequently ordered to take other action, it must do it. By making this argument, City misses the point. It cannot be disputed that once a purported conflict is resolved and action is ordered, the parties are bound to comply. However, at issue here is *when* the appropriate time for such resolution should occur. This Court opines that the appropriate time is after similar issues are resolved on appeal and not simultaneously. Indeed, a main purpose of this stay is to avoid conflicting or inconsistent determinations or orders. Again, City does not deny that this risk exists. Furthermore, even if this risk was not present, then at a minimum, the appeal may narrow and/or moot the issues, as explained below.

### b. Similar issues in the CEQA and Cemex actions

This Court finds that similar issues exist between the Cemex action and the CEQA action which counsel in favor of stay. More specifically, in this action, City asserts claims which were addressed in the Cemex Action when City made challenges to the Consent Decree.

(1) further CEQA review

City presently claims that the County has failed to exercise independent judgment due to the Consent Decree. It states that the County has "provided no CEQA-based rationale for repudiating the prior Findings" for the Project and that the County has "deferr[ed] all independent judgment to a third party in clear violation of CEQA." (Petition, p. 30.) It further claims that "despite no favorable changes to the actual environmental conditions at the project, [the County has] capitulated to the concept of preemption . . . ." (*Id.* at 31)

Similarly, in its Opposition to the Consent Decree in the Cemex Action, City argued that the Consent Decree impermissibly asked the Court to determine that further County environmental review would be preempted. (Opposition, pp. 18-19.) However, this Court addressed these issues in its Order: "[t]he City's main concern is that the Consent Decree does not allow for full compliance. Thus, perhaps in an effort to obscure the fact that the County review process does in fact comply with state law, the City contends that this Court does not have the authority to approve the Proposed Consent Decree absent an express finding that any application of CEQA to the Project is preempted." (Order, p. 20.) It then determined that based on "the Administrative Record before the Court and the long history of environmental

analysis conducted on this Project, it is this Court's finding that the Consent Decree sets forth a Project that complies with all substantive requirements of CEQA, fully identifies significant environmental effects and feasible mitigations, and which, in fact, provides additional environmental and other benefits to the County as a whole and the City in particular." (*Id.*) Finally, this Court found that further environmental review was preempted: "this Court independently finds on the basis of the record before it, that only further County review is preempted, because the Consent Decree and its related documents satisfy the requirements of state law, including both CEQA and . . . [SMARA]." (*Id.* at 21.) Thus, City's current claims that the Project fails to satisfy CEQA's requirements is an issue encompassed by the Court's Order.

(2) "retroactive conduct" provisions

City claims that "retroactive conduct" provisions in the Consent Decree "intimidate" the County and prevent the County from carrying out its purported obligations under state law due to "threats" and coercion from Cemex. Again, this Court finds that these are claims that this Court addressed in its prior Order, concluding that "contrary to the unsubstantiated allegations of the City, the Consent Decree did not arise as a result of 'duress' and 'coercion.'" (Order, p. 14.) After a lengthy discussion, this Court concluded that the purported "retroactive conduct" provision in the Consent Decree in no way interfered with the County's ability to carry out its functions in relation to the Project. (*Id.* at 14-18.)

(3) claims regarding the supplemental biological opinion

City's Petition challenges that the Supplemental Biological Opinion ("SBO") prepared by the U.S. Fish and Wildlife

Service for the Project in 2001 to address potential impacts on the arroyo toad, a federally-listed endangered species, "does nothing to preserve the Arroyo Toad species." (Petition, p. 32.) It claims that various provisions in the SBO, identified to minimize impacts to the arroyo toad, actually create greater impacts to the arroyo toad and thus "eviscerates" the County's ability to enforce mitigation measures for the Project in violation of CEQA. (*Id.* at ¶¶ 67, 69, 77-73, 77, 78.) In its Opposition in the Cemex Action, City raised nearly identical claims, arguing that recirculation under Section 15088.5 of the CEQA Guidelines was triggered due to the mitigation measures identified in the SBO.[7] (Opposition, pp. 26-29.) In the Order, this Court addressed these claims, concluding that they were "without merit and lacking of evidence." (Order, p. 26.) Specifically, this Court concluded that "this Court finds that the Project remains as previously analyzed and has not significantly changed in a way relevant to environmental concerns. Since the City's challenge to the Consent Decree is based on alleged project changes in without merit, no . . . recirculation of the EIR is required." (*Id.* at 27.)

(4) claims regarding an alleged "project acceleration" condition

As it did in opposing the Consent Decree, City claims that an alleged "project acceleration" condition "allows for a stepped increase in mining production" and a "drastic acceleration in the sale of marketable material" purportedly shortening "the twenty year term of the Project by nine years." (Petition, pp. 37-38.) This language is identical to the language used by City in its Opposition to the Consent Decree. This Court dismissed the City's "project

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[7] As noted by the County, paragraph 67 of the Petition contains language identical to a portion of the City's prior Opposition.

acceleration" theory, concluding that, in fact, the condition was nothing more than a cap on the amount of yearly production that Cemex might carry out. (Order, pp. 27-28.)

(5) claims regarding purported undisclosed cancer risks

City alleges that there are "undisclosed cancer risks" for the Project. (Petition, ¶¶ 86-94.) Again, City repeats this claim from its Opposition, and again this Court already addressed the claims. This Court concluded that "the County has carefully and conscientiously examined any comment letters which purport to raise significant new information, and made specific and extensive findings that no new information has been raised." (Order, p. 30.) As such, this Court concluded that City's claims regarding "undisclosed cancer risks" did not raise any significant new information affecting the environmental conclusions for the Project. (*Id.* at 31.)

(6) claims regarding air and water permits

City alleges that Cemex must obtain air and water permits from various state agencies, and that the Record of Decision for the Project purportedly requires that Cemex obtain various permits. (Petition, ¶¶ 95-100.) It alleges that these permits may not be obtained until "all of the information needed for an accurate assessment of air and water quality impacts has been gathered and analyzed." (*Id.* at p. 43.) Not surprisingly, City had argued in its Opposition that the "CEQA process . . . may not be concluded until all of the information needed for an accurate assessment of air quality impacts has been gathered and analyzed." (Opposition, p. 44.) As this Court stated previously, "nothing in the Decree purports to affect any CEQA processes that may be ancillary to Federal Clean Air

Act or Federal Clean Water Act permits that Cemex needs to operate the project. Thus, nothing in the Consent Decree restrains the AQMD or the State Water Resources Control Board from conducting such CEQA procedures as may be required by law." (Order, p. 33.)

(7) other claims

The County also points out that a number of other claims raised by the City were also raised in its Opposition to the Consent Decree and resolved by this Court:

1. City claimed that the current conclusions in the Consent Decree regarding traffic methodologies are improper; this is an issue raised here (*see* Opposition, p. 38; Petition, ¶ 101);

2. City claimed in its Opposition that it "has an absolute right to be consulted [by the County] on this Project under CEQA" (Opposition, p. 24) and now claims that "certification of the EIR was done in disregard for the rights of the City because it vitiates the City's absolute right to consultation pursuant to CEQA . . ." (Petition, ¶ 109);

3. City's claims regarding alleged procedural improprieties in the County's Findings raised in its Opposition (*see*, e.g., Opposition, pp. 37-40) are mirrored in City's Seventh Claim for Relief, alleging County failure to make necessary Findings. (Petition, ¶¶ 116-120.)

Thus, in view of the above conflict between the injunctive relief of the Order and Consent Decree and the relief requested here and the similar issues between the Cemex and CEQA Actions, this Court finds that the orderly course of justice weighs in favor of a stay.

In Opposition, City argues that a decision on the Appeal will not simplify the issues in this action because the issues differ. It claims that its current issues regarding project splitting, inadequacies of the project description, inadequate cumulative effects analysis, failure to re-circulate, and violations of the DMS were not before the Court in the Cemex Action. In making its determination, this Court is by no means finding that all issues in the Cemex and CEQA Actions are identical. Instead, as demonstrated above, this Court finds that a significant overlap of facts and questions of law exists. This overlap is sufficient to satisfy the requisite factor of "whether the stay would simplify . . . issues, proof, and questions of law." The standard is not whether the issues are identical, as City advocates. As stated in the Standard, *supra*, a stay of an action pending resolution of independent proceedings which bear upon the case does not require that the issues in such proceedings are necessarily controlling of the action before the Court. *Mediterranean Enterprises, Inc.*, 708 F.2d at 1465 (quoting *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979)).

Furthermore, City cannot seriously dispute that an affirmance of some issues in the Cemex action could subject the present claims to res judicata and/or collateral estoppel, or at the very least, would narrow the present claims. Moreover, if the Ninth Circuit reverses or overturns the Consent Decree, this CEQA Action essentially becomes moot. For those legal and factual issues not affected by the Appeal, City will have its opportunity to address and litigate them. As such, a stay will not offend "fundamental fairness" which, as City states, "requires that the City have a complete and full opportunity to substantively litigate its state law claims regarding the County's FEIR certification and Project approval." A stay is just that and not a determination on the merits of City's claims. When the stay is lifted, City will have its opportunity

to present all remaining claims of its case.

* * * * *

(4)

No. 05-1462

FILED
JUN 16 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

CITY OF SANTA CLARITA,

*Petitioner,*

v.

COUNTY OF LOS ANGELES, CEMEX, INC., AND UNITED STATES BUREAU OF LAND MANAGEMENT,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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## COUNTERSTATEMENT TO QUESTION PRESENTED

The Ninth Circuit allowed Petitioner City of Santa Clarita limited intervention in the underlying District Court action to protect its rights of consultation under the California Environmental Quality Act in light of a Consent Decree proposed by the existing parties, Respondents herein. The City of Santa Clarita objected to the Consent Decree, but the District Court, reviewing an extensive factual record, concluded that the City of Santa Clarita's right of consultation had been fully exercised and was not impacted by the terms of the Consent Decree. In an unpublished memorandum, the Ninth Circuit affirmed, concluding that the Consent Decree was fair, adequate and reasonable to all concerned. Neither the District Court nor the Ninth Circuit made any conclusions as to the collateral effects of the Consent Decree.

1. Whether the City of Santa Clarita properly petitions the Supreme Court to address purported concern regarding the Circuit Courts' application of *Firefighters v. Cleveland*, when the City of Santa Clarita failed to raise this claim at the District Court or Ninth Circuit;

2. Whether the City of Santa Clarita properly petitions the Supreme Court to address premature, and thus unripe, claims of purported collateral effects of the Consent Decree, given that neither the District Court's decision, nor the Ninth Circuit's unpublished decision, made any conclusions on this issue;

**COUNTERSTATEMENT TO QUESTION PRESENTED** – Continued

3. Whether the City of Santa Clarita properly petitions the Supreme Court to address a purported misunderstanding or misapplication of *Firefighters v. Cleveland*, where no confusion as to *Firefighters* exists;

4. Whether the Court of Appeals correctly concluded that the Consent Decree – which was negotiated in a contentious settlement process – was fair, adequate and reasonable where the District Court made factual determinations, based on extensive records, that Petitioner City of Santa Clarita's right of consultation under the California Environmental Quality Act had been fully exercised, and that the County had gained significant environmental concessions.

## PARTIES TO THE PROCEEDINGS

No statement regarding the parties to this proceeding was provided by the City of Santa Clarita.

The petitioner in this case is the City of Santa Clarita (hereinafter "Santa Clarita"). The respondents are the United States of America, the County of Los Angeles, and CEMEX, Inc. The caption of Santa Clarita's petition identifies the Bureau of Land Management as a respondent. This is in error; the United States is the proper respondent in this matter.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, counsel for Respondent CEMEX, Inc. certifies the following:

Respondent CEMEX, Inc. is a publicly traded company having its principal place of business in Houston, Texas. Respondent CEMEX, Inc.'s parent corporation is CEMEX, S.A. de C.V., with its principal place of business in Monterrey, Mexico. No publicly-held company owns ten percent or more of the stock of CEMEX, Inc.

TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT TO QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDINGS | iii |
| CORPORATE DISCLOSURE STATEMENT | iv |
| TABLE OF CONTENTS | v |
| TABLE OF AUTHORITIES | vii |
| STATEMENT OF CASE | 1 |
| A. The Soledad Canyon Sand and Gravel Mining Project | 1 |
| B. District Court Proceedings | 4 |
| C. The Court of Appeals' Decision | 7 |
| D. Current Litigation Being Pursued By Santa Clarita | 8 |
| SUMMARY OF ARGUMENT | 10 |
| ARGUMENT | 12 |
| A. Santa Clarita Did Not Challenge the Application of *Firefighters* Below | 12 |
| B. The Decision Below is Unpublished and Has No Precedential Effect | 13 |
| C. Santa Clarita's Arguments, if Ever Appropriate for Review, Are Now Premature and its Remedies Lie Before Other Courts | 13 |
| D. Even if Properly Raised Before this Court, There is No Conflict Between the Circuits Nor any Indication that *Firefighters v. Cleveland* is Being Misapplied | 14 |

TABLE OF CONTENTS – Continued

Page

E. The Issues Presented to the District Court and Affirmed by the Ninth Circuit are Inextricably Fact Based and Were Correctly Determined ..... 19

1. Santa Clarita's Right is one of "Consultation" and it Has Been Satisfied ..... 19

2. Santa Clarita's "Right to Judicial Review" is Satisfied by its Pending District Court CEQA Lawsuit ..... 22

3. Santa Clarita's "Rights" as a Surface Owner and as a Municipality Are Preserved ..... 23

4. The District Court and Ninth Circuit Fully Addressed All Appropriate Legal Claims Raised by Santa Clarita ..... 24

F. The Use of Consent Decrees to Settle Environmental Disputes is Well Established ..... 27

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

Page

CASES

*Center for Biological Diversity, et al. v. U.S. Fish and Wildlife Service, et al.*, ___ F.3d ___, 2006 WL 1521120 (9th Cir. 2006) ..... 8

*Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984) ..... 25, 28

*Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096 (10th Cir. 2004) ..... 18, 19

*Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117 (2nd Cir. 1983) ..... 16

*Lawyer v. Department of Justice*, 521 U.S. 567 (1997) ..... 14, 27

*Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. Cleveland*, 478 U.S. 501 (1986) ..... *passim*

*Officers for Justice v. Civil Serv. Commission*, 688 F.2d 615 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Service Comm'n*, 459 U.S. 1217 (1983) ... 7, 15

*Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991) ..... 17

*Sanguine, Ltd. v. United States Department of Interior*, 798 F.2d 389 (10th Cir. 1986) ..... 16, 18

*Sierra Club Inc. v. Electric Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990) ..... 15, 25, 28

*Southern California Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002) ..... 17

*United States v. Armour & Co.*, 402 U.S. 673 (1971) ..... 27

*United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998) ..... 16, 18

TABLE OF AUTHORITIES – Continued

Page

*United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) ..... 16, 18, 26

*United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir. 1990) ..... 28

*United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275 (1st Cir. 2000) ..... 17

*United States v. Montrose Chem. Corp.*, 50 F.3d 741 (9th Cir. 1995) ..... 15

*United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) ..... 15, 25

*Wheeler v. American Home Products Corporation*, 582 F.2d 891 (5th Cir. 1977) ..... 16

*Youakim v. Miller*, 425 U.S. 231 (1976) ..... 12

FEDERAL STATUTES

Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ..... 8

Mineral Materials Act of 1947, 30 U.SC. § 601 *et seq.* ..... 1

National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4231 *et seq.* ..... 2

STATE STATUTES

California Environmental Quality Act ("CEQA"), California Public Resources Code § 21000 *et seq.* ..... *passim*

California Public Resources Code, § 21153(a) ..... 20

California Surface Mining and Reclamation Act, California Public Resources Code § 2710 *et seq.* ..... 3

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE DECISIONS

*Sierra Club, Santa Clarita Chapter, et al.*, 156 IBLA 144 (Jan. 8, 2002) ..... 3

RULES AND REGULATIONS

U.S. Supreme Court Rules
Rule 10 ..... 10

Rule 29.6 ..... iv

Federal Rules of Appellate Procedure
Rule 32.1 ..... 13

Ninth Circuit Court of Appeals Rules
Rule 36-3(a) ..... 13

## STATEMENT OF CASE

Following well over a decade of environmental review under federal, state and local laws, CEMEX, Inc. ("CEMEX") filed the underlying lawsuit in early 2002 to compel the County of Los Angeles ("County") to complete its environmental review of the Soledad Canyon Sand and Gravel Mining Project ("Project"). The United States subsequently intervened as a plaintiff to support its interests in the Project as owner of the mineral estate to be mined by CEMEX pursuant to federal contracts issued in 1990, and to represent the Bureau of Land Management ("BLM") as the federal agency charged with implementation of the Mineral Materials Act of 1947, 30 U.S.C. § 601 *et seq.* The parties entered into the Consent Decree in 2004 to settle disputes relating to the interplay of federal and County jurisdiction over the Project. Santa Clarita, having been allowed limited intervention by the Ninth Circuit based on its right of consultation under the California Environmental Quality Act ("CEQA"), California Public Resources Code § 21000 *et seq.*, protested the entry of the Consent Decree. Based on an extensive factual record, the District Court found the Consent Decree to be fair, reasonable and adequate, and specifically found that Santa Clarita had fully exercised its right of consultation during the review processes for the Project, and that the Consent Decree in no way impacted its rights of consultation. The Ninth Circuit upheld the District Court's decision.

### A. The Soledad Canyon Sand and Gravel Mining Project

The underlying action involves the United States' and CEMEX's efforts to implement the Project. The facts recited herein were independently reviewed by the District Court and affirmed in its decision, and are set forth in

detail in the Consent Decree. Petitioner's Appendix (hereinafter "App.") C-38-50. The Project site is in the Soledad Canyon area of unincorporated Los Angeles County, approximately 30 miles north of downtown Los Angeles and over 1½ miles from the municipal boundary of Santa Clarita. Ninth Circuit Supplemental Excerpts of Record, "SER," 97-98. The United States owns the minerals at the site and the property is administered through the BLM. The BLM, by virtue of a federal Court approved settlement in 1988:[1] (a) made the decision to sell the mineral materials in 1989 through competitive bidding; (b) awarded federal contracts to CEMEX's predecessor in 1990 allowing it to mine aggregate on the site; (c) completed an independent environmental review of the project under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4231 *et seq.*, from 1995 to 2000; (d) completed a 2,000 page Environmental Impact Statement ("EIS") under NEPA; and (e) issued a final Record of Decision ("ROD") in 2000.

Santa Clarita participated extensively in the BLM process, including the submission of voluminous written comments and in person meetings with the BLM. SER 709-10, 733-36, 2058-62. In addition, Santa Clarita appealed the ROD to the Interior Board of Land Appeals ("IBLA"). Following Santa Clarita's filing of multiple briefs, the IBLA issued an order precluding Santa Clarita from submitting additional briefs. SER 27-28. The IBLA

[1] Prior to the settlement, the site was being mined by Ben Curtis, the surface owner at the time, and his unsuccessful litigation regarding his continued mining operations resulted in two appeals to the Ninth Circuit. *United States of America v. Canyon County Enterprises*, 9th Cir. No. 90-55302 and *United States of America v. Canyon County*, 9th Cir. No. 98-56042.

then issued an order affirming the ROD and the BLM's environmental analysis, rejecting in full Santa Clarita's claims. *Sierra Club, Santa Clarita Chapter, et al.*, 156 IBLA 144 (January 8, 2002).

The County's involvement in the Project began in 1989 as well. The County's activity under California's Surface Mining and Reclamation Act ("SMARA"), California Public Resources Code § 2710, *et seq.*, and CEQA, began formally in May of 1991 when CEMEX's predecessor submitted an application for a surface mining permit. Under CEQA, the County was the lead agency. The County began CEQA proceedings by issuing a Notice of Preparation ("NOP") for an environmental impact report ("EIR") on November 6, 1991. It was not until 1999, eight (8) years after CEMEX had submitted its application to the County, that a completed draft EIR was publicly circulated for nine months of public review and comment. The County's professional planning staff issued a staff analysis for the Project that recommended approval. SER 1041-59, 2460. As found by the District Court, the County held over nineteen continued public hearing sessions on the Project, both before the Regional Planning Commission, and before the Board, including at least ten public hearing sessions with public comment and/or testimony, giving the County ample opportunity to hear the public's concerns with, comments on, and opposition/support for, the Project. App. C-122; *see also* SER 1062-93, 1098-1229, 1231-33, 1235-60, 1309-10, 1312-44, 1351-92, 1454-1539, 1546-86, 1602-70, 1725-30, 1765-84. The District Court also found that Santa Clarita participated in at least nine (9) of these public hearings. App. C-122; *see also* SER 1061, 1098-1101, 1225-29, 1316-25, 1354-91, 1456-1527, 1558-78, 1602-08, 2080-85.

Following these public hearing sessions, the Los Angeles County Regional Planning Commission voted to deny the Project on grounds CEMEX believes were pretextual.

**B. District Court Proceedings**

The County's denial of the Project was appealed to the County Board of Supervisors and ultimately necessitated the filing of the lawsuit by CEMEX against the County which outlined in detail the environmental review of the Project for over a decade. On January 25, 2002, CEMEX filed the underlying lawsuit in the U.S. District Court, Central District of California, challenging the County's repeated and continued delay and obstruction of the Project. CEMEX alleged that the County's environmental review was complete under CEQA, and that denial of the permit was pretextual and without basis. Thus, CEMEX's Complaint alleged that the County engaged in a process designed to result in a "*de facto*" denial of the Project through a seemingly endless politically-driven review process before the County, including nearly a decade of environmental review, multiple series of delays, changing and inconsistent environmental review standards, and excessive, unreasonable and infeasible proposed Project conditions. Preemption of the County process was sought as an alternative basis for relief. The United States intervened as a plaintiff in the action. Santa Clarita sought intervention, but was initially denied intervention by the District Court. Santa Clarita appealed this denial to the Ninth Circuit.

After the filing of the lawsuit, the parties were ordered (pursuant to local rules) to participate in a mediation

conducted by a retired federal judge that, after almost a year of hard fought negotiations, resulted in the Consent Decree approved by the District Court and affirmed by the Ninth Circuit Court of Appeals. The mediation process was ordered in December of 2002 and Santa Clarita was aware of settlement negotiations. SER 162, 224.

The claim that the Consent Decree disregards years of environmental review, Petition at 12, is not true. The Consent Decree navigates the interplay between federal and County jurisdiction over the Project, allowing for County environmental review under CEQA, while maintaining the integrity of the federal mineral materials program and the specific BLM decisions relating to the Project. The Consent Decree also allows the County to complete its environmental review process, and to impose on the Project a host of environmentally and socially beneficial conditions otherwise not required. App. C-63-78. The Consent Decree does not truncate environmental review, but rather directs that after a decade of environmental review at both the federal and state level, the County must issue a surface mining permit, thereby allowing the next phase of the Project to begin. The District Court considered, and rejected, the argument that any significant new information existed that warranted further analysis. App. C-110-118.

After the parties submitted the Consent Decree to the District Court, the Ninth Circuit reversed the District Court and granted Santa Clarita limited intervention relating to its rights of consultation under CEQA. App. B-3-8. The Ninth Circuit specifically directed that Santa Clarita took the case as it found it, and could only address prospective matters in the case: "the City shall be entitled to be heard concerning the court's approval of any consent decree proposed between the original parties, and to

appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in the case." App. B-9.

Santa Clarita then filed an extensive opposition to the Consent Decree. The District Court reviewed the voluminous factual record supporting the Consent Decree, comprised of an Administrative Record of over 30,000 pages. Ninth Circuit Excerpts of Record, "ER," 928. In addition, in reviewing the proposed Consent Decree, the District Court reviewed additional documents either judicially noticed or supported by declaration. In this review, the District Court considered in detail the extent to which Santa Clarita participated in the process. In its Order Approving the Entry of the Consent Decree, the District Court concluded as follows:

> This Court is not persuaded with the City's argument that it was excluded from the process. The record is clear that the City has actively participated throughout the framing, analysis and development of this Project. In fact, the County encouraged the City's participation as a commenting party on the Project. However, unsatisfied with its role as a commenting party, it appears now that the City has adopted a no-holds barred approach to do whatever is in the City's power to either stop the Project or continue with this never ending review process. This Court will not allow the City to usurp the County's CEQA process simply to stop or further delay the Project. App. C-109-110.[2]

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[2] The voluminous factual record considered by the District Court revealed that Santa Clarita: (1) spent over $4,000,000 to oppose the Project, SER 2387; (2) constantly shifted its environmental concerns; (3)

(Continued on following page)

The District Court's Order entering the Consent Decree was detailed, App. C-85-123, and specifically found that, based on an extensive Administrative Record before the Court and the long history of environmental analysis conducted for the Project, the Consent Decree sets forth a Project that "fully identifies significant environmental effects and feasible mitigations, and which, in fact, provides additional environmental and other benefits to the County as a whole and the City in particular." App. C-107.

### C. The Court of Appeals' Decision

In reviewing the Consent Decree, the Court of Appeals focused on whether it was "fair, reasonable and adequate to all concerned." App. A-2, *citing Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Service Comm'n*, 459 U.S. 1217 (1983). In an unpublished opinion, the Court determined that: (1) CEMEX's underlying lawsuit was "based on a plausible legal claim – that further county environmental review of the project was preempted"; (2) the County "had sole authority to settle the case"; (3) the Project had "undergone more than a decade of state environmental review"; (4) the "parties negotiated the consent decree in good faith and at arm's length"; and (5) the County "obtained significant environmental concessions." App. A-2. The Court emphasized that the "whole point of a consent decree is that the court need not adjudicate the merits[,]" and specifically concluded only that the district court acted "well within its discretion" in approving the Consent Decree. App. A-2.

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did not seek environmental compliance but rather to block all CEMEX permits and to destroy its business, SER 83-84; and (4) repeatedly stated its "willingness to spend whatever it takes" to stop the Project, SER 2347.

## D. Current Litigation Being Pursued By Santa Clarita

At this time Santa Clarita is currently still litigating three lawsuits in the federal courts (two of which are pending before the Ninth Circuit Court of Appeals) that advance environmental challenges to the Project.[3] Given this, Santa Clarita's statement in the Petition (p. 12) that the Consent Decree effectively forecloses "Santa Clarita's efforts to insure a complete and thorough environmental review" is inaccurate at best.[4]

Santa Clarita's pending federal court cases include:

(a) *City of Santa Clarita, et al. v. U.S. Dept. of Interior, et al.*, Ninth Circuit Court of Appeals, No. 06-55006 (U.S. District Court, Northern District of California, No. CV-02-00697 DT) an action challenging the Project under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, – summary judgment granted against Santa Clarita by Order dated November 21, 2005 with 34 pages

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[3] A non-Santa Clarita challenge to the Project was brought as well. The Ninth Circuit Court of Appeals recently issued a published opinion upholding a decision by Judge Takasugi of the U.S. District Court, Central District of California, favorable to the Project, finding no error by the U.S. Fish and Wildlife Service in the issuance of a biological opinion for the Project in 1998 pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. *See Center for Biological Diversity, et al. v. U.S. Fish and Wildlife Service, et al.*, ___ F.3d ___, 2006 WL 1521120 (9th Cir. 2006).

[4] Santa Clarita's statement that it is precluded from seeking "additional mitigation measures[,]" Petition at 12, fails to acknowledge that the Consent Decree actually includes many mitigation measures and conditions suggested by Santa Clarita that were not legally required for the Project, ER 905.

of Findings of Fact and Conclusions of Law dated January 30, 2006;

(b) *City of Santa Clarita v. U.S. Dept. of Interior Board of Land Appeals et al.*, Ninth Circuit Court of Appeals, No. 06-55225, consolidated with Case No. 06-55006 (U.S. District Court, Northern District of California, No. CV 04-1572 DT), an action challenging the Project under NEPA – summary judgment granted against Santa Clarita by Order dated January 3, 2006, with 37 pages of Findings of Fact and Conclusions of Law dated February 8, 2006; and

(c) *City of Santa Clarita v. Los Angeles County Board of Supervisors*, U.S. District Court, Northern District of California, No. CV-04-7356 DT, an action challenging the Project under CEQA which is still pending; contrary to Santa Clarita's characterization, the district court stayed the CEQA action while the Consent Decree was on appeal to the Ninth Circuit recognizing that "In making its determination [to stay] this Court is by no means finding that all issues in the Cemex and CEQA actions are identical . . . For those legal and factual issues not affected by the Appeal, the City will have its opportunity to address and litigate them." App. J-21.

## SUMMARY OF ARGUMENT

Santa Clarita seeks further review of the Consent Decree, even though there are no legal issues warranting review. The District Court concluded the Consent Decree to be fair, reasonable and adequate, and specifically, that Santa Clarita's right of consultation had been fully exercised and was not impacted by entry of the Consent Decree. The Court of Appeals affirmed. Now, Santa Clarita alleges a host of rights purportedly abridged by the Consent Decree, and seeks review by the Supreme Court of issues that were never raised in the prior proceedings, are not presented by the facts of this case, or are premature and thus unripe.

Under this Court's standard for granting *certiorari*, Santa Clarita must show that the Ninth Circuit Court of Appeals: (1) issued a decision in conflict with that of another Court of Appeals; (2) decided an important question of federal law that has not been settled by this Court; or (3) decided an important federal question in conflict with relevant decisions of the Supreme Court. Supreme Court Rule 10. None of these bases apply.

The underlying decisions by the District Court and Court of Appeals were largely factual decisions that present no novel or significant legal issues worthy of review by this Court. The District Court and Court of Appeals applied well-settled standards for consent decrees – whether they are fair, reasonable and adequate – to an extensive administrative record of over 30,000 pages, to make a factual determination that Santa Clarita's right of CEQA consultation had been exercised and is not impaired by the Consent Decree. In fact, Santa Clarita concedes in

its Petition that "the City actively participated in the CEQA review process[.]" Petition p. 3.

Santa Clarita struggles to construct legal issues worthy of this Court's review. This effort fails in its entirety. For example, Santa Clarita alleges a "routine, now doctrinal confusion" regarding the application by the Circuit Courts of this Court's opinion in *Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. Cleveland* ("*Firefighters*") 478 U.S. 501 (1986). Yet Santa Clarita never raised this argument below, and is precluded from raising it for the first time here. More importantly, even if properly raised, the claim fails; there is no conflict between the Circuits and no indication that *Firefighters* has resulted in injustice or has been misapplied.

Similarly, Santa Clarita protests the purported collateral effects of the Consent Decree, yet the Ninth Circuit expressly did not address such effects of the Consent Decree. In fact, as discussed above, Santa Clarita has other litigation currently pending – including two other Ninth Circuit appeals and a U.S. District Court CEQA action – that challenge the environmental review of the Project. The extent to which the Consent Decree has collateral impact on these other cases will be determined in the first instance in these other pending cases. Santa Clarita's protests regarding purported collateral effects of the Consent Decree are at best premature and unripe, and certainly not properly raised before this Court.

## ARGUMENT

### A. Santa Clarita Did Not Challenge the Application of *Firefighters* Below

Santa Clarita's main attempt to interest this Court in the Petition is a purported Circuit conflict in the application of *Firefighters*. However, at no point in the briefing before either the District Court or the Ninth Circuit Court of Appeals did Santa Clarita assert the arguments it makes here. There was no challenge to the application of *Firefighters* in any briefing before the Petition was filed, and it was not cited by either the District Court, App. C-85-123, or the Ninth Circuit Court of Appeals, App. A-1-3. In fact, at no time in any briefing or argument before the Ninth Circuit did Santa Clarita even cite to *Firefighters*.[5] Having failed to challenge the application of the *Firefighters* decision below, Santa Clarita is precluded from challenging it for the first time in this Petition. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Thus, the purported Circuit conflict (which in any event, as discussed below, does not exist) is not properly raised to this Court.

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[5] Santa Clarita's only cite to *Firefighters* before the District Court was a one-line statement that because a consent decree is both a settlement and a final judgment, its dual character "has resulted in different treatment for different purposes" *citing Firefighters*. Santa Clarita's Opposition to Motion to Enter Consent Decree, at 46, lines 13-15. Santa Clarita did not cite *Firefighters* in its Ninth Circuit briefs, and notably, it is not cited at all in the portion of Santa Clarita's brief submitted in support of the Petition where it argues the Consent Decree infringes on its right to consultation. App. I-7-8. Only one amicus party before the Ninth Circuit cited *Firefighters*, and in no way criticized the application or interpretation of it.

### B. The Decision Below is Unpublished and Has No Precedential Effect

Further undermining Santa Clarita's Petition is the fact that the Ninth Circuit's Memorandum is unpublished. App. A-1. Pursuant to Ninth Circuit Rule 36-3(a), "[u]npublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, *res judicata*, and collateral estoppel." Thus, the decision establishes no precedent, and has no impact on the decisions of other panels of the Ninth Circuit or District Courts within that Circuit.[6]

### C. Santa Clarita's Arguments, if Ever Appropriate for Review, Are Now Premature and its Remedies Lie Before Other Courts

As detailed herein, Santa Clarita is currently involved in no less than three lawsuits, two of which are currently pending before the Ninth Circuit Court of Appeals, regarding Santa Clarita's complaints about the environmental review of the Project. Whatever collateral effect there may be from the Consent Decree on these other challenges will be litigated in those actions.[7] Nothing in the Ninth

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[6] We note that the Supreme Court recently adopted an amendment to Federal Rule of Appellate Procedure 32.1 that will be effective on December 1, 2006, providing in relevant part that "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written disposition that have been . . . designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like . . . *issued on or after January 1, 2007*." (Emphasis added). Thus, Circuit Court Rules prohibiting the citation of unpublished decisions, including the Ninth Circuit Rule 36-3, will remain in effect for all decisions issued prior to January 1, 2007.

[7] *See, e.g., Firefighters*, wherein the Supreme Court noted that the district court's retention of jurisdiction regarding the consent decree left

(Continued on following page)

Circuit's unpublished Memorandum purports to address the collateral effects of the Consent Decree. Accordingly, it is premature and unripe for Santa Clarita to seek to have this Court address the impact of the Consent Decree which will be addressed in the first instance in other pending cases.

### D. Even if Properly Raised Before this Court, There is No Conflict Between the Circuits Nor any Indication that *Firefighters v. Cleveland* is Being Misapplied

Santa Clarita's reliance on a purported misapplication of *Firefighters* by subsequent courts is misplaced. Even if Santa Clarita properly raised this argument below, which it did not, cases following *Firefighters* have not resulted in any need for the opinion to be reexamined by this Court.[8] Rather, subsequent case law is notable for its general harmony in examining consent decrees and their effects on third parties.

Initially, the Supreme Court has not substantively revisited *Firefighters* since 1997, and then, only in the context of deciding whether an underlying case must be adjudicated before entry of a consent decree, and this Court concluded it did not. In 1997, in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) the majority opinion held that a settlement between the United States Department of

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that forum open for the petitioner to press whatever claims it might have as to the effect of the consent decree on the petitioner's legal rights. 478 U.S. 501, 514, n. 5; also 478 U.S. at 530.

[8] Santa Clarita's reliance on commentators no more recent than 1988, Petition at 24, reveals a lack of concern or topicality on the points upon which its Petition seeks review by this Court.

Justice and the State of Florida regarding voting district configuration could not be blocked by the objections of one of the plaintiffs who demanded that the legality of the original redistricting plan be determined before the settlement could be approved. The majority ruled that the district court was not required to adjudicate the underlying liability before approving the settlement.

In reviewing the Consent Decree here, the District Court below relied upon, *inter alia*, *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991)[9] and *Sierra Club Inc. v. Electric Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990), App. C-95. The Ninth Circuit relied upon, *inter alia*, *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995), App. A-2. Each of these cases was decided *after Firefighters* and evidences no confusion or misapplication of its holding or analysis.

Santa Clarita contends that the circuit courts are "confused" regarding the meaning of *Firefighters*, and more specifically, about the "process due an objecting third party in cases involving consent decrees." Petition at 18. Yet in truth, the circuit courts have not expressed any such confusion. The string citation of cases offered by Santa Clarita, Petition at 18-19, offers nothing other than examples of cases where consent decrees were either entered or rejected in light of challenges from non-consenting third parties. In fact, not one of the cases cited by Santa Clarita offers any evidence of confusion on the

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[9] Both courts also relied upon *Officers For Justice v. Civil Service Comm'n*, *supra*, 688 F.2d 615, a case which predates the *Firefighters* decision but is consistent with its analysis and holding.

part of the court in question regarding the application or effect of *Firefighters*. Indeed, Santa Clarita's failure to engage in any analysis of these cases (other than one-line parenthetical summaries) is not surprising, given that the cases do not demonstrate any confusion by the courts or conflicts between Circuits regarding *Firefighters*.

In fact, Santa Clarita's list of citations purportedly showing conflict between the Circuits relating to the application of *Firefighters* flatly misstates the law. First, because a number of the cases cited by Santa Clarita predate *Firefighters*, they clearly cannot show confusion as to its application. *See, e.g., Wheeler v. American Home Products Corporation*, 582 F.2d 891 (5th Cir. 1977); *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc); *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117 (2nd Cir. 1983).

Second, in other cases cited by Santa Clarita, the courts have applied *Firefighters* and its logic with consistency. Thus, in *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998), the Eleventh Circuit found a consent decree between the United States and the City of Hialeah invalid to the extent it adversely affected the legal rights of unions and other objecting parties. The Eleventh Circuit expressly found that the consent decree would adversely affect legal rights conferred on police and firefighters via collective bargaining agreements. 140 F.3d at 981-82. In *Sanguine, Ltd. v. United States Department of Interior*, 798 F.2d 389, 391 (10th Cir. 1986), the Tenth Circuit upheld the district court's vacating of a prior consent decree because of the adverse effects that the consent decree would have upon tribal members' rights: "this case presents a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior

judgment and allowing the opportunity to litigate the merits of the case."

The cases cited by Santa Clarita in which there was no impairment of third party rights have also been resolved in harmony with *Firefighters*. For example, in *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991), the Seventh Circuit upheld the district court's denial of intervention to several parties who protested the terms of a consent decree settling claims challenging Illinois' abortion laws, concluding in part that their interests were adequately represented by the state, and that "[p]rejudice to the intervenors (or other members of the proposed class) if intervention is denied . . . is problematic at best." Similarly, in *Southern California Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002), the Ninth Circuit upheld entry of a consent decree, recognizing that under *Firefighters*, a nonconsenting party cannot block a settlement between other parties by withholding consent, but also acknowledging that *Firefighters* provides an exception where "nonconsenting intervenors" have brought "valid claims" that are "properly raised." *Id.* at 807. From this, the Ninth Circuit concluded that the intervenor did not raise "valid claims" within the *Firefighters* exception because the exception only applies where an intervenor can maintain claims that are independent from those of the settling parties. *Id.* at 807. So too, in *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 279 (1st Cir. 2000), the First Circuit addressed claims that *Firefighters* required an evidentiary hearing, but found that requirement to be limited to employment discrimination cases, and that no such absolute right to an evidentiary hearing applied in other contexts.

Finally, *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096 (10th Cir. 2004) directly undermines Santa Clarita's mischaracterization of Circuit conflict in the interpretation or application of *Firefighters*. There, in addressing whether a consent decree adversely affected a union's interests, the Eleventh Circuit, *citing Firefighters*, stated that a non-consenting intervenor may block approval of a consent decree only if the decree adversely affects its legal rights or interests, *citing* directly the holdings in *United States v. City of Hialeah*, *supra*, 140 F.3d at 975 and *United States v. City of Miami*, *supra*, 664 F.2d at 447. *Id.* at 1107. The Eleventh Circuit's reference to and reliance on these decisions thus undermines the City's assertion of conflict among the circuits and, in fact, directly contradicts the City's assertion that *Johnson v. Lodge #93 of Fraternal Order of Police* is in conflict with *City of Miami* and *City of Hialeah*. *See* Petition at 18. Rather, in contrast to Santa Clarita's portrayal, unlike the courts in *City of Miami* and *City of Hialeah*, the Eleventh Circuit in *Johnson* found that the consent decree did not affect the union's legal rights. *Id.* at 1107.

*Johnson v. Lodge #93 of Fraternal Order of Police* also undermines the City's claims because the Court also considered the union's assertion that a trial on the merits was necessary in race discrimination cases. 393 F.3d at 1108. The union relied in part on *Sanguine*, *supra*, 798 F.2d 389 (also a Tenth Circuit decision), but the *Johnson* Court clarified that:

> In *Sanguine*, we held that because "issues essential to the intervenors were resolved by consent decree and not adversary litigation, [the] case presents a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to

> litigate the merits of the case." . . . The case is distinguishable. The intervenor in *Sanguine* was not granted intervenor status prior to entry of the decree and thus was unable to effectively present its objections to the decree. In contrast, here, the district court permitted [the union] to intervene prior to settlement negotiations, *to file written objections to the consent decree in the district court, and to participate in the fairness hearings as a full party to the litigation. Accordingly, as was the case with the intervening union in [Firefighters] Local No. 93, [the union] was afforded "all the process that [it] was due."*

*Id.* at 1108-09 (citations omitted) (emphasis added). The participation in the consent decree review process afforded the union in *Johnson v. Lodge #93 of Fraternal Order of Police* mirrors that afforded to Santa Clarita.

That courts have entered or rejected consent decrees based on third party challenges does not reflect confusion; to the contrary, it demonstrates that the courts understand when entry of a consent decree is or is not appropriate in light of a third party challenge. The discussion below demonstrates that Santa Clarita received all that it was entitled to in the Consent Decree review process.

### E. The Issues Presented to the District Court and Affirmed by the Ninth Circuit are Inextricably Fact Based and Were Correctly Determined

#### 1. Santa Clarita's Right is one of "Consultation" and it Has Been Satisfied

Every administrative body or court which has considered the arguments of Santa Clarita has concluded that its

right to consultation under CEQA has been fully exercised. The "right" about which Santa Clarita complains was specifically described in the 2004 Ninth Circuit opinion allowing Santa Clarita to proceed as an intervenor as the right of consultation under CEQA. App. B-5. CEQA confers upon Santa Clarita a right to consultation with the County, the local lead agency:

> [E]very local lead agency shall consult with, and obtain comments from, each responsible agency, any public agency that has jurisdiction by law with respect to the project, and any city or county that borders on a city or county within which the project is located. . . .

California Public Resources Code § 21153(a). Santa Clarita has repeatedly and consistently characterized the right which it argues the Consent Decree infringes on as the right to CEQA consultation. *See, e.g.*, Santa Clarita Opposition to Motion to Approve Consent Decree pp. 49-50; App. I-7-8.

Based on an extensive factual record, the District Court noted that "the City and the public had ample opportunity to review and comment on the Project[,]" based on Santa Clarita's submittal of at least nine (9) comment letters on various drafts of the County's Environmental Impact Report, and participation in at least nine (9) County public hearings on the Project. App. C-121-122. The District Court further noted that, even after the formal close of public commenting on the Project, the "County requested that CEMEX meet with the City and other public groups to attempt to address all community concerns over the Project." App. C-122. The Ninth Circuit, in ordering Santa Clarita's intervention in 2004, also concluded that Santa Clarita "exercised its CEQA right of

consultation and strongly opposed CEMEX's plans to proceed with gravel mining in Soledad Canyon." App. B-2. As an intervenor, Santa Clarita fully vetted its arguments concerning potential effects of the Consent Decree on its consultation rights under CEQA.

The District Court also concluded that Santa Clarita was aware of settlement negotiations between the parties as early as November of 2002 despite representations to the contrary. SER 162, 224. Yet at that time, Santa Clarita did not seek to expedite its appeal of the intervention ruling that was pending before the Ninth Circuit. In other words, Santa Clarita's statement in its pending Petition that it was excluded from the negotiating process leading up to the Consent Decree fails to recognize the timing was of Santa Clarita's own making.

So, too, in the unpublished Memorandum of the Ninth Circuit affirming the entry of the Consent Decree, the Court concluded that the County, acting as the lead agency under California law, had the sole authority to settle the case and that when the settlement occurred, the Project had undergone more than a decade of state environmental review. App. A-2. It was argued to the Ninth Circuit in papers submitted and in oral argument that the Consent Decree expressly recognizes that other permits will be required before the Project can become operational and that the Consent Decree does not preclude continuing oversight of the Project by applicable regulatory agencies. Under the Consent Decree, the County also retains full authority to enforce all Project conditions and environmental mitigation measures (now and in the future) and to take lawful action in response thereto. App. C-11-12. The Ninth Circuit was aware of the other pending environmental challenges by Santa Clarita to the Project and

specifically stated in its unpublished Memorandum that "the panel retains jurisdiction over all future appeals involving this mining project." App. A-3.

During oral argument before the Ninth Circuit, the panel stated that the complaints of Santa Clarita as to its role in the environmental review process should be directed to the California State Legislature for, in fact, Santa Clarita's true complaint was that it wanted a greater role in the CEQA process than the statute provides. Santa Clarita, throughout the environmental review process, both at the federal and County level, established that it wanted to control decisions properly within the County's province relating to the Project.

The point simply is that the "right" which Santa Clarita seeks to assert and complains it is precluded from enjoying is a right of consultation which the substantial factual record before the District Court (and the Ninth Circuit) established was amply exercised and not precluded by the Consent Decree about which Santa Clarita complains.[10]

### 2. Santa Clarita's "Right to Judicial Review" is Satisfied by its Pending District Court CEQA Lawsuit

Santa Clarita has a pending lawsuit challenging on CEQA grounds the County's actions implementing the

[10] The Consent Decree is not a bilateral agreement of a trilateral dispute simply because it settles only disputes between CEMEX and the United States against the County. Any separate, i.e., third, dispute that Santa Clarita might have against the County or CEMEX and the United States, may be raised elsewhere. Moreover, the Consent Decree concludes the CEQA process, and in doing so, was found not to impact Santa Clarita's right of consultation under CEQA.

terms of the Consent Decree. As discussed above, the impact of the Consent Decree on those claims has not been adjudicated by either the District Court or the Ninth Circuit, and will be determined in the first instance by the District Court when the CEQA lawsuit is litigated. Santa Clarita's claims in its Petition that the District Court's entry of the Consent Decree "denied Santa Clarita its day in court[,]" Petition at 10, is thus untrue because its day in court relating to its CEQA lawsuit and other matters has yet to come.[11]

### 3. Santa Clarita's "Rights" as a Surface Owner and as a Municipality Are Preserved

Santa Clarita also contends that it has "proprietary interests" as owner of the Project's surface estate, which Santa Clarita will readily admit it recently bought, App. G-5, for the sole purpose of enhancing its standing to object to the Project, as owner of municipal property purportedly affected by the Project, and as an employer.

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[11] Moreover, any suggestion that the Consent Decree precludes Santa Clarita generally from opposing the Project and voicing its concerns rings hollow. In addition to its litigation efforts, Santa Clarita has a pending application to the Los Angeles Local Agency Formation Commission to annex the Project site into Santa Clarita's municipal boundaries (again, the site is currently within County territory), an effort admitted by Santa Clarita to be designed to aid in blocking the Project. Santa Clarita is also currently lobbying for passage of federal legislation designed to specifically preclude only this Project by canceling the mineral contracts that the BLM issued to CEMEX's predecessor, Transit Mixed Concrete, in 1990. In fact, Santa Clarita is on record regarding its intent to "[a]ttack all subsequent agency permits[ ]" for the Project, SER 83, and to "[d]evelop [a] package of measures to interfere with TMC's business plan," SER 84. Santa Clarita thus is not lacking in stratagems, or in venues, in which to challenge the Project.

Petition at 11. Santa Clarita fails to state how these purported state law rights – which were not identified by the Ninth Circuit as a basis for granting limited intervention, App. B-1-10 – are affected by the Consent Decree. Again, however, what impact, if any, the Consent Decree has on these other purported state law "rights" has not yet been adjudicated.

### 4. The District Court and Ninth Circuit Fully Addressed All Appropriate Legal Claims Raised by Santa Clarita

In 2004, the Ninth Circuit explicitly directed that Santa Clarita was to take the case as it found it:

> We note that the District Court may move forward with a consent decree between CEMEX and the County. . . . the City shall be allowed to intervene as of the date of this disposition, and to be treated as an intervenor party from that date forward. . . . Thus, the City shall be entitled to be heard concerning the court's approval of any consent decree proposed between the original parties, and to appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in this case.

App. B-8-9. Accordingly, it was clear from the moment that intervention was granted in 2004 that Santa Clarita was limited to arguing legal claims or defenses directly challenging the Consent Decree itself, but not relating to the underlying merits of CEMEX's complaint. Any Santa Clarita complaint as to the propriety of this limited grant of intervention is undermined by the fact that Santa Clarita never further appealed the scope of intervention ordered by the Ninth Circuit over two (2) years ago, App.

B, either by seeking *en banc* review or petitioning this Court for review.

Though Santa Clarita protests the adequacy of a "fairness hearing"[12] to address its concerns relating to the Consent Decree, what it really laments is that its legal theories relating to the Project were not adjudicated in its favor. However, this lament is in direct contradiction to the very purpose of the consent decree process, namely to reach compromise between parties without the need for full adjudication of the underlying legal issues. A district court should enter a consent judgment if the court decides that it is fair, reasonable, and equitable and does not violate the law or public policy. *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, *supra*, 909 F.2d 1350, 1355; *see also United States v. Oregon*, *supra*, 913 F.2d 576. The consent decree must also conform to applicable laws. *See United States v. Oregon*, 913 F.2d at 580. Additionally, where a consent decree may affect the public interest, there is a heightened responsibility on the court to protect that interest, but "the court need not require that the decree be 'in the public's *best* interest' if it is otherwise reasonable." *Id.* at 581 (citations omitted). Ultimately, in approving a consent decree, the "court need only be satisfied that the decree represents a reasonable factual and

[12] This language is used by Courts approving Consent Decree in all cases – not merely class actions. *See, e.g., Sierra Club v. Electronic Controls Design, Inc.*, *supra*, 909 F.2d 1350, 1355 (Consent decree challenge involving Clean Water Act citizen suit by Sierra Club against private party), *citing Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984) (Involving dispute as to consent decree in multi-party litigation under the Clean Water Act).

legal determination." *Id. citing United States v. City of Miami, supra*, 664 F.2d 435, 441.

Santa Clarita claims that the "fairness hearing" looked only to whether the Consent Decree was "fair, reasonable and equitable" as to the consenting parties, and relied upon the "arm's length" negotiations among those parties as the basis for entry of the Consent Decree. Petition at 13. Santa Clarita concludes that this process "illustrates the routine, now-doctrinal confusion of courts substituting the test of fairness to settling parties for an inquiry into the rights of non-settling parties." *Ibid.*

This claim is remarkable for its misstatement of the actual factual review conducted by the District Court. Santa Clarita filed lengthy objections to the Consent Decree, App. C-100-123; I-1-8, and the Court considered them at a lengthy hearing. The bulk of the District Court's Order granting the motion for entry of the Consent Decree, App. C-85-123, addresses Santa Clarita's numerous arguments in opposition to the Consent Decree. Santa Clarita contends that "[w]hen the court reviews a proposed consent decree to which a party has not consented, it should be asking whether the consenting parties are taking away from the nonconsenting party to whom they are adverse that which may not be summarily taken." Petition at 14. Yet this is precisely the inquiry that *was* conducted. As discussed above, the District Court noted that "[t]he record is clear that the City has actively participated throughout the framing, analysis, and development of this Project." App. C-109. The District Court further assessed in detail whether the Consent Decree would impair public interests, including *inter alia*, Santa Clarita's first amendment right to petition government and the public right of review under CEQA. App. C-120-121.

Santa Clarita's claim that the District Court "extinguished" Santa Clarita's rights based on a finding that the parties to the Consent Decree "'negotiated the consent decree in good faith and at arm's length[,]'" Petition at 15, is far from the truth. The District Court went far beyond an assessment of whether the Consent Decree was fair and reasonable to the consenting parties, and actually adjudicated the host of claims raised by Santa Clarita in opposition to its entry. Thus, the District Court did reach a "ruling on the merits" of Santa Clarita's arguments in opposition to the Consent Decree. *See* Petition at 16-17. In fact, Santa Clarita's discussion of *Lawyer v. Department of Justice*, *supra*, 521 U.S. 567, Petition at 16 n. 6, actually provides support for this conclusion. As admitted by Santa Clarita, the "fairness hearing" in *Lawyer* allowed the non-consenting plaintiff to raise challenges to the consent decree and to present evidence in support of those claims. 521 U.S. at 574-75. The District Court afforded Santa Clarita the very same opportunity, which Santa Clarita embraced in full. Santa Clarita's "claims" relating to the Consent Decree thus were adjudicated in full.

### F. The Use of Consent Decrees to Settle Environmental Disputes is Well Established

Santa Clarita's attempt to find error in the case law is further undermined by the reality that the use of consent decrees is firmly established. *See, e.g., United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) ("Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.")

It is precisely for this reason, i.e., avoidance of prolonged litigation and the possibility of environmental concessions, that in the environmental arena, Courts have upheld the use of consent decrees. *See, e.g., United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 88 (1st Cir. 1990) (environmental cleanup matter; deference to agency required because of its expertise and need for flexibility in forging appropriate resolution); *Sierra Club v. Electronic Controls Design, Inc., supra*, 909 F.2d 1350, 1355 (consent decree challenge involving Clean Water Act citizen suit by Sierra Club against private party); *Citizens for a Better Environment v. Gorsuch, supra*, 718 F.2d 1117, 1125-26 (involving dispute as to consent decree in multi-party litigation under the Clean Water Act).

## CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

CITY OF SANTA CLARITA,

*Petitioner*,

v.

COUNTY OF LOS ANGELES, CEMEX, INC., and UNITED STATES BUREAU OF LAND MANAGEMENT,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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## TABLE OF CONTENTS

TABLE OF CONTENTS ..... (i)

TABLE OF AUTHORITIES ..... (ii)

ARGUMENT ..... 1

I. The Question Was Properly Presented Below ..... 2

II. Santa Clarita Was Granted the Full Rights of an Intervenor as of Right, Including the Right to Have Its Validly-Raised Claims Adjudicated on the Merits ..... 3

III. Cemex's Argument That the Case is "Unripe" Is Wrong and an Instructive Example of the Bait-and-Switch Stratagem Routinely Employed to Insulate Such Consent Decrees from Judicial Examination ..... 5

IV. That *Firefighters* Has Spawned Confusion Regarding the Rights of Nonconsenting Parties Is Manifest from the Case Law and Vividly Illustrated by This Case ..... 7

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Arizona v. California*, 460 U.S. 605 (1983) ..... 4

*Capital Cities Cable, Inc. v. Crisp*,
467 U.S. 691 (1984) ..... 2

*Cerro Metal Products v. Marshall*,
620 F.2d 964 (CA3 1980) ..... 4

*City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) .... 3

*Columbus-America Discovery Group v.
Atlantic Mutual Insurance Co.*,
974 F.2d 450 (CA4 1992) ..... 4

*Firefighters v. Cleveland*, 478 U.S. 501 (1986) ..... 1, 7

*Johnson v. Lodge #93 of Fraternal Order of Police*,
393 F.3d 1096 (CA10 2004) ..... 8, 9

*Kirkland v. New York State Department of
Correctional Services*,
711 F.2d 1117 (CA2 1983) ..... 7, 8

*League of United Latin American
Citizens v. Clements*,
999 F.2d 831 (CA5 1993) ..... 2

*Martin v. Wilks*, 490 U.S. 755 (1989) ..... 9

*Ragsdale v. Turnock*, 941 F.2d 501 (CA7 1991) ..... 8

*Sanguine, Ltd. v. United States Department of Interior*,
798 F.2d 389 (CA10 1986) ..... 9

*Southern California Edison Co. v. Lynch*,
307 F.3d 794 (CA9 2002) ..... 8-9

*Stringfellow v. Concerned Neighbors in Action*,
480 U.S. 370 (1987) ..... 4

*United States v. City of Hialeah*,
140 F.3d 968 (CA11 1998) ..... 8

*United States v. City of Miami*,
664 F.2d 435 (CA5 1981) ..... 2, 7, 8

*United States v. Comunidades Unidas Contra La Contaminacion*,
204 F.3d 275 (CA1 2000) ..... 8

*Wheeler v. American Home Products Corp.*,
582 F.2d 891 (CA5 1977) ..... 7

*Youakim v. Miller*, 425 U.S. 231 (1976) ..... 2

**FEDERAL STATUTES**

Fed. Rule Civ. Proc.

Rule 24(a) ..... 4
Rule 24(c) ..... 5

## STATE STATUTES

Cal. Pub. Res. Code Ann.

§ 21153(a) (West Supp. 2006) ..... 6
§ 21168 (West Supp. 2006) ..... 6

## OTHER AUTHORITIES

7C C. Wright & A. Miller, Federal
Practice and Procedure
§ 1922 (2d ed. 2006 Supp.) ..... 4

Laycock, Consent Decrees Without Consent:
The Rights of Nonconsenting Third Parties,
1987 U. Chi. Legal F. 103 ..... 7

## ARGUMENT

The first observation to be made about the Brief in Opposition to Petition for Certiorari (Opp.) is the nearly complete absence of any defense of the rule of law raised in the Petition for Writ of Certiorari (Petn.), the rule upon which the judgment below rests. Respondent Cemex, Inc. (Cemex) offers nary a word on behalf of the practice of bilateral settlements of trilateral disputes. Rather than defending the abrogation of the rights of Petitioner City of Santa Clarita (Santa Clarita), Cemex fabricates a claim that Santa Clarita was granted limited intervention and suggests that there is some uncertainty whether Santa Clarita's rights may yet survive. Rather than refuting Santa Clarita's demonstration that such bilateral settlements are now widely used to terminate the rights of nonconsenting parties, Cemex confirms and celebrates the practice. Rather than defending the Ninth Circuit's erroneous review and affirmance of the consent decree under the standard for reviewing class-action settlements challenged by dissident class members, Cemex simply recites that the Court of Appeals did so.

Cemex's acknowledgment of the widespread practice of bilateral settlements of trilateral disputes is also a complete answer to the objection that this case is not certiorari-worthy because it is not a published decision. The Ninth Circuit's memorandum disposition confirms the commonplace—but not universal—assumption that *Firefighters v. Cleveland*, 478 U.S. 501 (1986), sanctioned the sweeping use of consent decrees to which intervenors do not consent, consigning the practice to a netherworld of unpublished decisions in which rights die without consent and without adjudication. This intolerable practice will not be constrained unless and until this Court addresses it. Santa Clarita submits that this is the appropriate case for that review.

## I. The Question Was Properly Presented Below

Cemex would have this Court believe that Santa Clarita did not present the issue raised in its Petition to the courts below. Opp. i, 11, 12. That is absolutely false. The issue, whether a court may approve a consent decree that disposes of an intervenor as of right's properly presented claims over the intervenor's objection, was raised at every level of this litigation. The issue was briefed to the District Court, including citations to *Firefighters* as well as *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (CA5 1993) and to *United States v. City of Miami*, 664 F.2d 435 (CA5 1981). See Opp. 12, n.5; App. I-7-8. And the issue dominated the proceedings in the Ninth Circuit, where over three-quarters of the oral argument was devoted to the rights of nonconsenting intervenor Santa Clarita and to the effects of the consent decree on its rights.[1] There can be no doubt that the question Santa Clarita presents here was both "raised [and] resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) (emphasizing the practical flexibility of the standard).

A close reading of Cemex's brief reveals that it does not claim otherwise. Rather, Cemex complains that Santa Clarita did not assert below *the conflict in the circuits* over the interpretation of *Firefighters*. Opp. i, 11, 12. That, of course, is irrelevant—such conflict is of little interest to district courts or even circuit courts, which want simply to

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[1]The recording of the full oral argument is available on the Ninth Circuit's website at http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1. Whether a nonconsenting intervenor could even appeal from entry of the consent decree, under what standard that appeal would be reviewed, and the effects on the nonconsenting party were argued from 1:01 to 28:10, from 33:35 to 34:15, and from 36:48 to 47:12, a total of 38 of the 49 minutes of argument.

know what their own circuit authority says, but is of great importance to this Court. What Santa Clarita *did* assert below, and what the Ninth Circuit clearly understood to be at issue, was that a district court may not enter a consent decree over the objections of a nonconsenting intervenor as of right whose claims in the action were being abrogated by the decree. Differences in emphasis and detail in the briefing below are neither surprising nor significant to the exercise of certiorari jurisdiction. *Cf. City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion). The question presented here was undeniably presented below.

## II. Santa Clarita Was Granted the Full Rights of an Intervenor as of Right, Including the Right to Have Its Validly-Raised Claims Adjudicated on the Merits

Rather than confront the trilateral dispute squarely presented by this case, Cemex instead suggests that Santa Clarita's rights as an intervenor were somehow limited. Opp. 22-24. This argument is both factually and legally incorrect.

Cemex contends that Santa Clarita "was limited to arguing legal claims or defenses directly challenging the Consent Decree itself, but not relating to the underlying merits of Cemex's complaint." Opp. 24. Cemex purports to find this restriction in the Ninth Circuit's 2004 order granting Santa Clarita leave to intervene. Yet the Ninth Circuit's order contains no such limitation. Instead, the Court found that "[t]he City has a protectable interest in upholding the County's application of [the California Environmental Quality Act (CEQA)] against Cemex's allegations of abuse

of process and federal preemption." App. B-6.[2]

Cemex misreads the Ninth Circuit's intervention decision to somehow grant Santa Clarita less than full intervenor rights. Cemex is misreading the specific grounds said by that Court to satisfy the interest requirement of Federal Rule of Civil Procedure 24(a) as a limitation on Santa Clarita's rights.[3] The scope of the intervenor's rights is defined by the "practical . . . ability to protect [its] interest." Rule 24(a). Plainly the ability to challenge termination of the CEQA process was practically necessary to protect Santa

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[2]The Circuit's instruction that Santa Clarita may not "reopen any issues already decided in this case," App. B-9, is not a limitation on Santa Clarita's rights as an intervenor, but a general statement of intervention law. *E.g.*, *Arizona v. California*, 460 U.S. 605, 615 (1983) ("Of course, permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration."); *Cerro Metal Products v. Marshall*, 620 F.2d 964, 969-970 (CA3 1980) (similar language did not prevent intervenor as of right from appealing trial court ruling). The intervention decision confirms that while Santa Clarita could not reopen decided issues in the District Court, it was given full rights "to appeal the approval" of the consent decree, App. B-9, which necessarily includes review of any and all rulings underlying the decree.

[3]Indeed, courts and commentators disagree as to whether limitations *may* lawfully be imposed on an intervenor as of right. It is well-settled that the court may limit the participation of a permissive intervenor. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 381-382 & n.1 (1987) (Brennan, J., concurring) (discussing difference between permissive intervention and intervention as of right). But there are substantial doubts whether such restrictions on an intervenor as of right are permissible. See, *e.g.*, *id.* at 382, n.1 ("a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor"); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469-470 (CA4 1992) (intervenor as of right could not be denied opportunity to conduct pretrial discovery); 7C C. Wright & A. Miller, Federal Practice and Procedure § 1922 (2d ed. 2006 Supp.).

Clarita's CEQA interests. Moreover, Cemex's fictitious claim that the City "was limited to arguing legal claims or defenses directly challenging the Consent Decree itself, but not relating to the underlying merits of Cemex's complaint," Opp. 24, betrays a fundamental misunderstanding of the law of intervention. Rule 24(c) required Santa Clarita, an intervenor-defendant, to file an answer "setting forth the . . . defense for which intervention [wa]s sought." The answer necessarily relates "to the underlying merits of Cemex's complaint" by raising valid defenses to the complaint, and the District Court was bound to permit Santa Clarita to litigate the defenses on their merits.

## III. Cemex's Argument That the Case is "Unripe" Is Wrong and an Instructive Example of the Bait-and-Switch Stratagem Routinely Employed to Insulate Such Consent Decrees from Judicial Examination

Santa Clarita pointed out that the practice of approving consent decrees without a party's consent often depends on a superficial analysis of the decree's effects, deferring determination whether the objecting party has lost rights until after the decree has been approved. Petn. 22. Rather than disputing the point, Cemex has chosen to illustrate it.

Cemex tells the Court that "Santa Clarita has other litigation currently pending—including two other Ninth Circuit appeals and a U.S. District Court CEQA action" and promises that "[t]he extent to which the Consent Decree has collateral impact on these other cases will be determined in the first instance in these other pending cases." Opp. 11. The fact that Santa Clarita may have rights arising under other statutes is, of course, utterly irrelevant to the consent decree's termination of its rights under CEQA. And those rights have unquestionably been abrogated by the decree. By ordering

the County of Los Angeles to terminate its CEQA review, App. C-69, 80, by prohibiting any future CEQA review, App. C-71-73, 80, and by ordering issuance of the permits that CEQA says must be preceded by environmental review, App. C-76-79, 81, the consent decree leaves Santa Clarita no rights under the statute.

Santa Clarita's rights under CEQA embraced both the right to consult with the County as it carried out its duties and the right to challenge its final action in court if that action failed to comply with state law. Cal. Pub. Res. Code Ann. §§ 21153(a), 21168 (West Supp. 2006). Cemex argues that Santa Clarita did consult with the County. Opp. 3, 20. But that was not a one-time right. Absent the consent decree, there would have been further proceedings, for which Santa Clarita enjoyed a continuing right of consultation, followed, if necessary, by judicial review of the County's actions under the state law. Had prior consultations satisfied these rights, the Court of Appeals would not have recognized Santa Clarita's right of intervention in the ongoing litigation. Indeed, that Court recognized in 2004 that the practical effect of granting the relief requested by Cemex would be to "vitiate the City's right to consultation under CEQA." App. B-8.[4]

Cemex is reprising precisely the bait-and-switch sales pitch consenting parties often employ to overcome the objections of nonconsenting parties: suggesting at the time the decree is entered that its effects on those parties are innocuous or unclear, then, once the decree is entered, citing

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[4]Cemex's claim that this case somehow does not present a trilateral dispute is based on the argument that the consent decree only affects the signatories to the settlement. Opp. 22, n.10. Cemex makes it clear that its position is based on a steadfast refusal to recognize the practical impact of the decree. *Ibid.* ("the Consent Decree concludes the CEQA process, and[,] in doing so, was found not to impact Santa Clarita's right of consultation").

it to show that those same parties have no rights left. See Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 119. The lower courts' ratification of that process here is emblematic of the superficial analysis that has infected the consent-decree jurisprudence and the manifest injustice it has wrought.

As it happens, Cemex has obligingly provided refutation of its own ripeness argument. Cemex affirmatively states that the consent decree "concludes the CEQA process," Opp. 22, n.10, and that the District Court has already reached a ruling on the merits of Santa Clarita's CEQA claim, *id.* 27, in the course of the "fairness" hearing, *ibid.* Cemex cannot now be heard to say that there is any uncertainty regarding Santa Clarita's remaining CEQA rights.

## IV. That *Firefighters* Has Spawned Confusion Regarding the Rights of Nonconsenting Parties Is Manifest from the Case Law and Vividly Illustrated by This Case

Santa Clarita laid out for the Court the conflicting and confused law on bilateral consent decrees in trilateral disputes. Petn. 18-19. Cemex denies that there is any conflict or confusion. Opp. 15-17. Cemex is wrong.

First, Cemex attempts to dismiss three of the cases—*Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117 (CA2 1983), *United States v. City of Miami*, 664 F.2d 435, and *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (CA5 1977)—on the ground that *Firefighters* postdates them. Opp. 16. In fact, *Firefighters* not only postdates the three, it cites them with approval. See 478 U.S. at 518, 529. Cemex cannot say that *Firefighters* overruled the three cases; on the contrary, all three have been widely cited and followed since 1986. They remain

conflicting, confusing landmarks on the consent-decree terrain.

Cemex's main tool to conceal the conflict in the remaining cases is the same superficial wording the cases themselves use to paper over the disparate outcomes. According to Cemex, the Rosetta Stone of the consent-decree-without-consent cases is whether "the consent decree would adversely affect legal rights." Opp. 16. That merely relabels the issue. The fact remains that the courts of appeals conflict over what legal rights may be abrogated by a consent decree to which a party does not consent. Perhaps the most clear example of that conflict is whether an intervenor union's rights arising out of a collective bargaining agreement may be abrogated by a bilateral consent decree to which it has not consented. The Fifth and Eleventh Circuits have said in *United States v. City of Hialeah*, 140 F.3d 968, 976-978, 983 (CA11 1998) and *City of Miami*, 664 F.2d, at 442, 447 (Rubin, J.) that the union's rights may not be abridged. The Tenth Circuit rejected the union's request for protection from a consent decree the union claimed conflicted with its contract. *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096, 1107-1108 (CA10 2004).

The ineluctable fact remains that the circuits differ on when an intervenor's legal interest is sufficient that it must be protected from a consent decree to which it has not consented. The Fifth Circuit and the Eleventh Circuit (following Fifth Circuit law) are more protective of intervenors' rights in *City of Miami*, *Wheeler*, and *City of Hialeah*. The First, Second, Seventh, and Ninth are less protective in *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275 (CA1 2000), *Kirkland*, 711 F.2d 1117, *Ragsdale v. Turnock*, 941 F.2d 501 (CA7 1991), and *Southern California Edison Co. v. Lynch*, 307 F.3d 794

(CA9 2002)[5]. And the Tenth Circuit goes both ways. Compare *Johnson* with *Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389 (CA10 1986).[6]

The confusion lies not only in determination of what rights of an intervenor must be protected but in the procedure to which the intervenor is entitled. Cemex's alternative justification for the abrogation of Santa Clarita's rights is that the District Court actually gave Santa Clarita an adjudication of its rights—in the "fairness hearing" on the consent decree. Opp. 26-27. If this strange proposition—that the Court took Santa Clarita's motion for summary judgment off-calendar to rule on the consent decree but in effect granted Cemex summary judgment against Santa Clarita— is true, it was not apparent to the Ninth Circuit. That Court explicitly approved the consent decree without reaching the merits. App. A-2

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[5]Cemex appears to agree that *Edison* reads *Firefighters* to say that an intervenor-*defendant* can never save its defenses from abrogation by consent decree. Opp. 17. Santa Clarita submits that this is a clear misreading of *Firefighters* and an example of the mischief being wrought by the circuits' construction of that case.

[6]Cemex's brief places *Johnson* in both the Tenth and Eleventh Circuits. Opp. 18. It comes out of the Tenth Circuit. Cemex can cite no case from the Eleventh Circuit that conflicts with the cases cited above.

*Johnson*'s explanation for the conflict is that in *Sanguine* the objecting intervenors had been denied intervention in a decision that was reversed on appeal and that by the time the intervenors returned to the District Court the consent decree had already been entered, which the Court of Appeals reversed to permit them to oppose the decree. *Johnson*, 393 F.3d at 1108-1109. That explanation highlights another source of confusion in the law that Santa Clarita had pointed out, Petn. 9-10, and Cemex does not address: Under *Martin v. Wilks*, 490 U.S. 755 (1989), the belated intervenor in *Sanguine* would be free to bring a collateral attack on the consent decree precisely because it was not a party, but not if it were an intervenor over whose objections the decree had been entered.

("The whole point of a consent decree is that the court need not adjudicate the merits."). And if that is what the District Court did, then, as Santa Clarita has pointed out, Petn. 16, the expedient of the "fairness hearing" reversed the standard of review from de novo review with all inferences favoring Santa Clarita to abuse-of-discretion review with all inferences favoring Cemex. No district court should be permitted to grant summary judgment in the guise of a "fairness" finding and, in doing so, to invert the standard for appellate review.

This confusion of standards and procedures is endemic to the post-*Firefighters* law of consent decrees. The conclusory treatment of intervenors' rights, the ad hoc pastiche of procedures, and the misguided standard of review that confuses the nonconsenting intervenors' rights with those of a dissident class member confirm the need for this Court to restore due process to the consent-decree jurisprudence.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

CITY OF SANTA CLARITA,
*Petitioner*,
v.

COUNTY OF LOS ANGELES, CEMEX, INC., AND UNITED STATES BUREAU OF LAND MANAGEMENT,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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June 16, 2006

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. Application of the Consent Decree to Bar The Defenses Of The City of Santa Clarita Has Violated The Rights Of The City Of Santa Clarita And All Of Those Whose Interests It Represents. ..... 4

II. Entry of the Consent Decree Without City Representation Has Deprived The City And Those Represented By Its Interests Of Significant Legal Rights Without Representation. ..... 6

III. Benefits Of Party Settlement Of Disputes Should Not Be Permitted To Overshadow Need To Ensure Fair Representation Of Interests Of All Parties. ..... 10

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

Page

### Cases

Alvardo v. J.C. Penney Co., Inc.,
997 F.2d 803 (10th Cir. 1993) ..... 8

Harrisburg Chapter of the ACLU v. Scanlon,
500 Pa. 549 (1983) ..... 11

Howsam v.Dean Witter Reynolds,
537 U.S. 79 (2002) ..... 10

Kirkland v. New York State Dept. Of
Correctional Services, 711 F.2d 1117 (1983) .. 11

Local Number 93, International Association
of Firefighters, AFL-CIO C.L.C.
v. City of Cleveland, 478 U.S. 501 (1986) .... 15

Southern California Edison Company
v. Lynch, 307 F.3d 794 (9th Cir. 2002) ... 13-14

United States v. City of Hialeah,
140 F.3d 968 (11th Cir. 1998) ..... 8, 11

United States v. City of Hialeah,
899 F. Supp. 603 (S.D. Fl. 1994) ..... 8

United States v. City of Miami,
664 F.2d 435 (5th Cir. 1981) ..... 11,14-15

## Statutes

Fed. Rule Civ. Proc. 24(a) ..... 7

Cal. Code Regs. tit. 14, §§ 15080-15096 (2005) ..... 4

Cal. Code Regs. tit. 14, § 15092 (2005) ..... 5

Cal. Code Regs. tit. 14, § 15093 (2005) ..... 5

## Other Authorities

Laylock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103 (1987) .... 11

Menger, Consent Decree Paradigms: Model Without Meaning, 29 B.C. L.Rev. 291 (1988) ..... 10

The Newhall County Water District, Sulphur Springs Union School District, and William S. Hart Union High School District[1] respectfully submit this *amici curiae* brief in support of the prayer of the City of Santa Clarita ("City") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## INTEREST OF *AMICI CURIAE*[2]

Sulphur Springs Union School District and William S. Hart Union High School District (collectively, "Santa Clarita Schools") are public school districts organized under the laws of the State of California. Collectively, the Santa Clarita Schools represent nearly 25,000 students in grades kindergarten through the grade twelve throughout the Santa Clarita community. The Newhall County Water District ("Newhall WD") is a county water district organized under the laws of the State of California, supplying water to approximately

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party to this dispute authored this motion or this brief in whole or in part and no person or entity other than *Amici Curiae*, their members, or counsel, made a monetary contribution to the preparation or submission of this motion or this brief.

[2] The Santa Clarita Agencies received written consent from the City of Santa Clarita, the County of Los Angeles, and CEMEX, Inc., to file this brief. The United States Bureau of Land Management has consented to this filing, with the representation by counsel that written consent will follow.

30,000 persons throughout the Santa Clarita community. Both the Santa Clarita Schools and the Newhall County WD serve constituents both within the City and in unincorporated areas of the County of Los Angeles ("County") surrounding the City.

Despite the differing purposes and goals of the Santa Clarita Schools and the Newhall WD (collectively, "Santa Clarita Agencies"), the entities share a common interest in the CEMEX case now before this Court. The CEMEX Project ("Project") threatens tremendous health and economic impacts to the constituents served by the Santa Clarita Agencies, as well as their respective employees and, as applicable, students. The Santa Clarita Agencies stand to be directly impacted by the potential environmental effects of the Project, which are at the core of the City's challenge of the consent decree entered into between the County and CEMEX ("Consent Decree"). Consequently, the Santa Clarita Agencies will be directly affected by the outcome of the case currently pending before this Court, both in the potential adverse health effects to their employees and students, as well as the potential adverse economic impacts resulting from required remedial measures necessary to protect their students and employees from resulting environmental pollution. In addition, Newhall County WD pumps water downstream of the Project, such that it is vitally interested in an adequate review of the effects of the Project on the water supply.

More important to the issue before the Court, the Consent Decree in this case foreclosed necessary additional environmental review of the Project, thus denying the Santa Clarita Agencies crucial protection from the potentially devastating threats imposed by the Project. By excluding the City from the negotiations of the Consent Decree, the voices of those most affected by the impacts of the Project have been left unrepresented, and, consequently silenced by parties at best nominally interested in the consequences of their decisions. Such a practice has no place in federal jurisprudence.

## SUMMARY OF ARGUMENT

The Santa Clarita Agencies wish to express their support for, and their desire to join in, the underlying arguments of the City in its Petition for Writ of Certiorari ("Petition"), filed before this Court on May 10, 2006. The Santa Clarita Agencies urge the Court to grant *certiorari* in this case, in light of the tremendous injustice inflicted by the termination of the rights of intervening third-party defendants, who, as a practical matter, are bound by consent decrees in which they have given no consent, reflecting settlements in which they had no voice. The circumstances presented within the City's Petition are representative of such injustices, as the rights of the City, and, by extension, the Santa Clarita Agencies, under existing state environmental law were terminated without an adversarial determination on the merits. Due

process demands that the interests of those most affected by the impacts of consent decrees be considered and heard before the binding consequences of such decrees (or in this particular case the Project) are thrust upon them. As such, justice requires that the Court consider this Case.

## ARGUMENT

### I. Application Of The Consent Decree To Bar The Defenses Of The City of Santa Clarita Has Violated The Rights Of The City Of Santa Clarita And All Of Those Whose Interests It Represents.

The Santa Clarita Agencies vehemently join in the request of the City that the Court grant the petition for writ of certiorari on the issue of whether the rights of a nonconsenting intervenor-defendant may be set aside by a consent decree entered into between a plaintiff and defendant who have, at best, minimum adverse interests in the underlying action.

In considering the Project under the California Environmental Quality Act ("CEQA"), the County was required to consult with affected agencies, prepare draft environmental reports, receive comments, hold hearings, and make certain required findings before otherwise approving the Project. *See generally* CAL. CODE REGS. TIT. 14, §§ 15080-15096 (2005). The proper process mandates

the opportunity for comments from not only the City, but also the Santa Clarita Agencies and other interested parties, which are to be reviewed and considered in conjunction with and before any consideration and approval of the Project.

Significant and damaging environmental impacts resulting from the Project, including effects on air quality, water quality, and traffic, all of which will have significant adverse effects on the abilities of the Santa Clarita Agencies to provide educational and water services to their respective constituents, would have been reviewed. Mitigation measures could then have been imposed on the Project, as feasible to avoid the adverse effects on the environment now complained of by the Santa Clarita Agencies and the City. CAL. CODE REGS. TIT. 14, § 15092 (2005).

Instead, the County, with a minimal interest in the potential harmful environmental impacts to be generated by the Project, and without any consultation with the City, the Santa Clarita Agencies, or any other party directly interested in the potential impacts, entered into a consent decree which foreclosed any further environmental review or consideration of impacts presented by the Project. In essence, the County ignored its responsibility to balance the economic benefits of the Project against the unavoidable environmental risks, CAL. CODE REGS. TIT. 14, § 15093 (2005), and blindly

determined that the "benefits" of the Project outweigh the environmental consequences, regardless of what those consequences might be.

The County's failure to represent the interests of Santa Clarita has been magnified by both the United States District Court and the Ninth Circuit Court of Appeal, which have both taken the further step of refusing the City, the party with a recognized interest as an intervenor as of right, any say in the Consent Decree that now determines their fate. Though the Consent Decree may not by its terms purport to "bind" the City or the Santa Clarita Agencies, its bypassing of the very environmental process in which the concerns of the City and other interested entities would be heard, considered, and addressed has nonetheless deprived the City, the Santa Agencies, and the citizens of Santa Clarita of vital rights under the law–all without representation.

## II. Entry of the Consent Decree Without City Representation Has Deprived The City And Those Represented By Its Interests Of Significant Legal Rights Without Representation.

By its very nature as a intervenor-defendant as of right, the City represents an interest in the underlying action in this case that (1) will as a practical matter be impaired or impeded by the Consent Decree, and (2) is not

otherwise adequately represented by the County as the original defendant in this action. Fed Rule Civ. Proc. 24(a). The Ninth Circuit recognized the City's position when it reversed the District Court and mandated that the City be joined in the action as a intervenor-defendant by right.[3]

The Santa Clarita Agencies were situated such that resolution of the action between CEMEX and the County stood to impede or impair their environmental interests. The City, however, having been admitted into the action as an intervenor-defendant of right, adequately represented those interests–and thus represented the interest of the entire Santa Clarita community by its presence in the action. Moreover, the concerns of the City relative to the project, including air and water quality and traffic impacts, coincided with the concerns of the Santa Clarita Agencies.

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[3] Federal Rule of Civil Procedure Section 24(a) provides, in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In light of the City's recognized status as a party representing interests not otherwise adequately represented by the defendant County, common sense would dictate that the City, as the representative of such interests and a recognized intervenor-defendant of right with rights as a full party to the action, should have been included in any settlement of the matter in dispute between the County and CEMEX. *See Alvardo v. J.C. Penney Co., Inc.*, 997 F.2d 803, 805 (10th Cir. 1993) (noting that intervenors are generally entitled to have claims litigated as if they were an original party).

The City should have been provided with a full opportunity to participate in the formulation of the proposed relief. *See United States v. City of Hialeah*, 899 F. Supp. 603, 611 (S.D. Fl. 1994). In the event settlement of the dispute was not possible, based upon the concerns represented by the City, then the defenses raised by the City should have been adjudicated before any action by the court to extinguish such defenses. *United States v. City of Hialeah*, 140 F.3d 968, 976-78, 983 (11th Cir. 1998).

The City, however, was not given such an opportunity. The County and CEMEX engaged in negotiations without the City. The two parties agreed upon the terms of the settlement to be outlined in the Consent Decree that thereafter would be binding on all parties. The County's agreement as to how it would

exercise its discretion to approve the Project and the foreclosure of any further environmental review essentially eliminated any rights of the City, or the Santa Clarita Agencies to consult with or raise concerns to be considered in such review.

As stated by the City within its Petition, the District Court could have allowed for the County and CEMEX to settle their issues, without terminating the rights of the City in the process. The settlement could have been structured not as a consent decree (which by its nature implies consent of all parties), but rather as a settlement between those two parties. Thereafter, the County could very well have stepped aside and allowed the City, at its discretion and at its cost, to litigate those interests not otherwise represented by the County.

Instead, the City, as a genuinely recognized party in the action, was ignored, and the consent decree was entered into and approved by the District Court without concern for the interests represented by the City.

## III. Benefits Of Party Settlement Of Disputes Should Not Be Permitted To Overshadow Need To Ensure Fair Representation Of Interests Of All Parties.

The issues presented by the City in its Petition are not unique to this action, but rather present far-reaching questions in all disputes in which original plaintiffs and defendants potentially hold the power to terminate the interests of third-parties. The application of consent decrees to bind such third parties is a significant detriment to the fair execution of justice in the federal court system, and must be reversed.

The benefits offered by settlements and consent decrees cannot be disputed –including often early resolution of disputes, reduced litigation expenses, more efficient use of judicial resources, and avoidance of litigation risks. *See, e.g.*, Menger, Consent Decree Paradigms: Model Without Meaning, 29 B.C. L. Rev. 291, 327-31 (1988). Those benefits, however, should not be allowed to overshadow the very goal of the judicial system to provide not only expeditious, but fair, resolutions of cases in controversy. *See Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 95 (2002).

Such an overshadowing is particularly prevalent in cases such as this, in which the interests of third-party

intervening defendants or plaintiffs may so easily be ignored in favor of consent decrees entered into by the original litigants, who often may have more of an interest in the quick resolution of the dispute rather than full and fair adjudication of the interests presented within such litigation. Such circumstances would appear to often arise when the original defendant, such as here, is a public entity brought into an action not because of a direct interest in the controversy, but rather a mandated statutory requirement or regulation causing it to become involved despite its actual desires or interests. See Laylock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 105-06 (1987) (hereinafter Laycock) (citing example of *Harrisburg Chapter of the ACLU v. Scanlon*, 500 Pa. 549 (1983); *see also City of Hialeah*, 140 F.3d, at 983-84; *United States v. City of Miami*, 664 F.2d 435, 442, 447; *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117, 1125-28 (1983). Such entities often lack the financial, political, or personal motivation to fully adjudicate such litigation, preferring instead to settle the litigation in the cheapest and simplest manner possible provided such resolution allows it to satisfy its obligations under the law Laylock, at 105-06. The interest of such entities is essentially similar to that of a "stakeholder in an interpleader." *Id.*

Such interests are contrasted with those of the real parties in interest that not only desire that the

"stakeholder" public entity perform its obligations under the law, but that it does so in a manner such that all interests, or at least its personal or political interests, are at least considered, and thus protected.

In this case, County is largely a party due to its status as the governing agency charged with the approval of any permits for the Project, which is situated within the County's planning jurisdiction. Under CEQA, the County is mandated by State law to conduct proper environmental analysis before it may consider the approval of the Project. In this instance, however, it is that requirement that concerns the County–rather than the direct environmental impacts of the Project that will largely be felt by the City, the Santa Clarita Agencies, and the people all of these agencies serve.

Consequently, it is the City, and not the County, that is the party with the real interest in ensuring that adequate environmental analysis is conducted prior to any approvals of the Project. By excluding the City from the resolution of this matter through the Consent Decree, the real interests in the matter are ignored, in favor of the limited interest of the County.

The consequences to the non-consenting third parties are magnified by the judicial pretext that the third parties are not bound by the terms of the consent decree. In this particular case, it is true that the City is not, by

the terms of the Consent Decree, "bound" to behave or act in any certain way. Nevertheless, the City's rights are directly linked to the review under CEQA that was to have been conducted by the County. If the County has, by decree, bypassed such review–then City's right to intervene and defend the need for specific CEQA review for impacts caused by the Project is meaningless–and there is by definition no environmental process for which the City's interests may be heard.

Numerous examples of circumstances in which the rights and interests of third-party intervenors have been ignored or conceivably set aside by proposed consent decrees between plaintiffs and "stakeholder" defendants can be found in existing case law.

In *Southern California Edison Company v. Lynch*, 307 F 3d 794 (9th Cir. 2002), the complaining energy company, Southern California Edison ("Edison"), filed an action against California Public Utilities Commission ("CPUC"), seeking to recover certain wholesale energy costs during a rate-freeze period in which Edison was prohibited from passing on costs of purchasing wholesale energy costs on to consumers. *Id.* at 801-02. A consumer group, devoted to protecting the interest of residential and small-commercial consumers, intervened in the action, likely accurately anticipating that such consumers would ultimately pay the price of any settlement. *Id.* at 802. Edison and the CPUC in fact agreed to and obtained a

stipulated judgment, in which the CPUC agreed to allow Edison to apply inflated rates to consumers for a period of two years to recover its prior costs from its retail consumers. *Id.* In rejecting a challenge by the consumer group, the Ninth Circuit focused on the ability of the intervenor-defendant to prevent the original parties from settling, *id.* at 806-07, ignoring the fact that the consumer group, as an intervenor-defendant and party representing the interests of those who would be required to pay the price of the original parties settlement, had an cognizable interest in pursuing the litigation to adjudication on the merits. Instead, a regulatory entity, as the original defendant with little price to pay in terms of settlement on its own, was permitted to pass costs of settlement on to the non-consenting intervenor.

Similarly, with a different result, in *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981), discrimination litigation was brought against the City of Miami on behalf of minority and female police applicants. *Id.* at 436. The US Attorney General and the City of Miami settled their dispute by way of a consent decree, which deprived members of the police union of certain rights under a contractual promotion procedure. *Id.* In that case, however, the court acknowledged the appropriateness of a consent decree only as to those settled issues that do not otherwise affect the rights of a nonconsenting party. *Id.* at 440. The remaining issues must otherwise be left to adjudication by the court, so that

a decision on the merits of those disputed issues may be reached. *Id.*

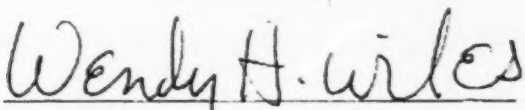
Additional examples of such attempts to bilaterally settle multi-party disputes can be found throughout the cases cited by the City. *See* Pet. at 18-19. In each of the circumstances, however, the potential damage of allowing neutral entities, merely seeking to follow or fulfill statutory or regulatory obligations, to settle and bind non-consenting third parties, who will bear the real burden of the settlement, is demonstrated. The injustice of any policy that would allow such a binding settlement to be placed upon non-consenting third-parties, when coupled with the split found in such cases applying such principals and the confusion in application of *Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986) cited by the City within its Petition, justify this Court's review of this issue to clarify the purpose and application of the consent decree designed to protect the rights and interests of all parties–and allow the adjudication of those rights truly in dispute.

## CONCLUSION

For the above-stated reasons, the Court should accept this case for review.

Dated: June 16, 2006

Respectfully submitted,



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